FEDERAL COURT OF AUSTRALIA

**Pioneer Mortgage Services Pty Ltd v Columbus Capital Pty Ltd [2015] FCA 1067**

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| Citation: | Pioneer Mortgage Services Pty Ltd v Columbus Capital Pty Ltd [2015] FCA 1067 |
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| Parties: | **PIONEER MORTGAGE SERVICES PTY LTD ACN 051 433 491 v COLUMBUS CAPITAL PTY LTD ACN 119 531 252 and PIONEER FIRST AUSTRALIA LTD (FORMERLY PIONEER FIRST LIMITED ) ACN 086 092 613;****COLUMBUS CAPITAL PTY LIMITED ACN 119 531 252 and PIONEER FIRST AUSTRALIA LTD ACN 086 092 613 v PIONEER MORTGAGE SERVICES PTY LTD ACN 051 433 491, STEPHEN GREGORY STEFANOWICZ and TUPEIA DANDO****PIONEER MORTGAGE SERVICES PTY LTD ACN 051 433 491 v COLUMBUS CAPITAL PTY LTD ACN 119 531 252 and PIONEER FIRST AUSTRALIA LTD (FORMERLY PIONEER FIRST LIMITED ) ACN 086 092 613** |
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| File numbers: | NSD 1328 of 2014NSD 526 of 2015 |
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| Judge: | **JAGOT J** |
|  |  |
| Date of judgment: | 1 October 2015 |
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| Catchwords: | **CONTRACTS** – whether applicant breached contractual obligation to “take such steps and maintain such procedures as would be taken and maintained by a reasonably prudent mortgagee in connection” with the loans – applicant in breach**CONTRACTS** – whether applicant breached contractual obligation to manage the relevant loans “in an efficient and businesslike manner and in accordance with sound business practices” – applicant vicariously liable for fraud perpetrated by employee – actions of employee undertaken in ostensible pursuit of applicant’s business and in apparent execution of authority – applicant breached contractual obligation **TRADE PRACTICES** – whether applicant engaged in misleading and deceptive conduct by falsely representing that customers had requested redraws – applicant engaged in misleading and deceptive conduct **DAMAGES** – whether too remote – damage not too remote |
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| Legislation: | *Competition and Consumer Act 2010* (Cth)*National Consumer Credit Protection Act 2009* (Cth)*Trade Practices Act 1974* (Cth) s 84*Trade Practices Amendment (Australian Consumer Law) Act (No 2) 2010* (Cth)  |
|  |  |
| Cases cited: | *Cinc v Bucan Holdings Pty Ltd* [2004] NSWSC 847*Deatons Pty Ltd v Flew* [1949] HCA 60; (1949) 79 CLR 370*Hadley v Baxendale* (1854) 9 Ex Ch 341 at 354; 156 ER 145*Lloyd v Grace, Smith & Co* [1912] AC 716*New South Wales v Lepore* [2003] HCA 4; (2003) 212 CLR 511*Paradise Constructors Pty Ltd v Lofts Quarries Pty Ltd* [2003] VSC 370  |
|  |  |
| Date of hearing: | 22-24 July 2015  |
|  |  |
| Date of last submissions: | 21 August 2015 |
|  |  |
| Place: | Sydney |
|  |  |
| Division: | GENERAL DIVISION |
|  |  |
| Category: | Catchwords  |
|  |  |
| Number of paragraphs: | 195 |
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| Counsel for the Applicant/First and Second Cross-Respondents: | Mr D McGovern SC and Mr L Tyndall |
|  |  |
| Solicitor for the Applicant/First and Second Cross-Respondents: | Sydney City Lawyers |
|  |  |
| Counsel for the First and Second Respondents/First and Second Cross-Claimants: | Mr MW Young SC |
|  |  |
| Solicitor for the First and Second Respondents/First and Second Cross-Claimants: | Bransgroves Lawyers |
|  |  |
| Counsel for the Third Cross-Respondent: | The Third Cross-Respondent did not appear |

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| **Table of Corrections** |  |
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| 13 April 2016 | In paragraph 136, delete the final two words, “and misrepresentations”. |

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| IN THE FEDERAL COURT OF AUSTRALIA |  |
| NEW SOUTH WALES DISTRICT REGISTRY |  |
| GENERAL DIVISION | NSD 1328 of 2014 |

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| BETWEEN: | PIONEER MORTGAGE SERVICES PTY LTD ACN 051 433 491Applicant |
| AND: | COLUMBUS CAPITAL PTY LTD ACN 119 531 252First RespondentPIONEER FIRST AUSTRALIA LTD (FORMERLY PIONEER FIRST LIMITED ) ACN 086 092 613Second Respondent |
| AND BETWEEN: | COLUMBUS CAPITAL PTY LIMITED ACN 119 531 252First Cross-ClaimantPIONEER FIRST AUSTRALIA LTD ACN 086 092 613Second Cross-Claimant |
| AND: | PIONEER MORTGAGE SERVICES PTY LTD ACN 051 433 491First Cross-RespondentSTEPHEN GREGORY STEFANOWICZSecond Cross-RespondentTUPEIA DANDOThird Cross-Respondent |

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| --- | --- |
| JUDGE: | JAGOT J |
| DATE OF ORDER: | 1 OCTOBER 2015 |
| WHERE MADE: | SYDNEY |

THE COURT ORDERS THAT:

1. The parties confer and file agreed or competing proposed orders reflecting the reasons for judgment within seven days.
2. The proceeding be listed for directions within a further seven days thereafter on a date to be determined in consultation with the parties.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

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| IN THE FEDERAL COURT OF AUSTRALIA |  |
| NEW SOUTH WALES DISTRICT REGISTRY |  |
| GENERAL DIVISION | NSD 526 of 2015 |

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| --- | --- |
| BETWEEN: | PIONEER MORTGAGE SERVICES PTY LTD ACN 051 433 491Applicant  |
| AND: | COLUMBUS CAPITAL PTY LTD ACN 119 531 252First RespondentPIONEER FIRST AUSTRALIA LTD (FORMERLY PIONEER FIRST LIMITED ) ACN 086 092 613Second Respondent |

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| JUDGE: | JAGOT J |
| DATE OF ORDER: | 1 OCTOBER 2015 |
| WHERE MADE: | SYDNEY |

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| NEW SOUTH WALES DISTRICT REGISTRY |  |
| GENERAL DIVISION | NSD 1328 of 2014 |

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| IN THE FEDERAL COURT OF AUSTRALIA |  |
| NEW SOUTH WALES DISTRICT REGISTRY |  |
| GENERAL DIVISION | NSD 526 of 2015 |

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| AND: | COLUMBUS CAPITAL PTY LTD ACN 119 531 252First RespondentPIONEER FIRST AUSTRALIA LTD (FORMERLY PIONEER FIRST LIMITED ) ACN 086 092 613Second Respondent |

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| JUDGE: | JAGOT J |
| DATE: | 1 OCTOBER 2015 |
| PLACE: | SYDNEY |

**REASONS FOR JUDGMENT**

##### THE PARTIES AND THEIR DISPUTES

1. Pioneer Mortgage Services Pty Ltd (**Pioneer**) describes itself as a mortgage originator and manager.
2. Columbus Capital Pty Ltd (**Columbus**) is a provider of financial services including lending services.
3. By various legal arrangements Pioneer and Columbus became subject to legal obligations under deeds entitled “Mortgage Origination and Management Deed” dated 27 July 1994 and 20 December 1995 (referred to as the **1994 and 1995 deeds**, respectively). In particular, by a deed of novation executed on 14 August 2013, Columbus became the successor in title under the 1994 and 1995 deeds to the Australian and New Zealand Banking Group Limited (**ANZ**), ANZ itself being a successor in title to the Primary Industry Bank of Australia Limited (**PIBA**,which subsequently changed its name to Rabobank Australia Limited or **Rabo**).
4. Pioneer First Australia Ltd (**Pioneer First**) is a special purpose vehicle which was established to be the lender of record for mortgages originated by Pioneer and funded by PIBA (or Rabo) and subsequently ANZ. By the deed of novation of 14 August 2013 and associated legal arrangements, Columbus took control of Pioneer First. In substance, Columbus acquired the business and loan book associated with the mortgages originated by Pioneer. This business is also referred to as the Origin business or loan portfolio.
5. Stephen Stefanowicz is a director of Pioneer and a guarantor of its obligations for events occurring before 14 August 2013. On that date, Pioneer, Columbus and Mr Stefanowicz entered into a deed of variation which varied certain obligations under the 1994 and 1995 deeds, including those relating to payment, and terminated Mr Stefanowicz’s obligations as guarantor for Pioneer in respect of events after 14 August 2013.
6. Tupeia Dando was an employee of Pioneer. Ms Dando did not appear at the hearing.
7. A number of events in 2014 and 2015 precipitated these proceedings.
8. First, Pioneer and Columbus discovered that between 2006 and 2014 Ms Dando had used her position as an employee of Pioneer to commit acts of fraud. On numerous occasions throughout that period, Ms Dando had arranged redraws from loan accounts of three borrowers with the funds being transferred by Pioneer First (the lender of record) to an account of Ms Dando’s husband, when the borrowers had not requested or authorised the redraws. Columbus has not been able to recover the bulk of the funds fraudulently obtained by Ms Dando.
9. Second, Columbus decided to impose an annual facility fee of $399 on Pioneer First borrowers. In proceedings NSD 1328 of 2014, Pioneer sought and obtained an interlocutory injunction restraining Columbus from doing so (which was subsequently varied). Pioneer claims that imposing the annual fee on borrowers who had entered into their loan facilities before 2008 involves a breach of contract by Columbus and that, otherwise, the notice which Columbus gave to borrowers of the proposed facility fee by letter dated 14 November 2014 involves misleading and deceptive conduct. As explained below, it is fair to say that the real focus of Pioneer’s case was the misleading and deceptive conduct claims which were put in numerous ways. The primary relief Pioneer seeks is final injunctions, but it also claims damages for alleged losses caused to it by reason of Columbus’ alleged misconduct.
10. Third, Columbus decided that Pioneer was liable to it for Ms Dando’s fraud and that the circumstances of that fraud having occurred gave rise to a breach of contract by Pioneer for which it was liable to Columbus. Columbus thus cross-claimed against Pioneer in proceedings NSD 1328 of 2014 claiming damages.
11. Fourth, from 1 April 2015, Columbus ceased to pay to Pioneer management fees under the contractual arrangements on the basis that it was not liable to do so by reason of contractual breaches by Pioneer. Columbus also threatened to terminate the contractual arrangements on account of those alleged breaches, serving on Pioneer various notices of default. In response to another application for interlocutory relief by Pioneer to restrain termination, Columbus undertook not to do so pending the resolution of a foreshadowed further claim for final relief by Pioneer in that regard. However, Columbus also made it clear that it would not be paying management fees to Pioneer.
12. Fifth, and as foreshadowed, Pioneer filed another application (proceeding NSD 526 of 2015) in which it seeks numerous declarations and orders which are largely responsive to Columbus’ cross-claim. The main effect of these claims is that Pioneer contends that it is not in breach of contract, that the notices of default are invalid, that Pioneer is not bound to acquire from Columbus the loans the subject of Ms Dando’s fraud, and that it is entitled to be paid the management fees outstanding and in future.

##### CONTRACTUAL ARRANGEMENTS AND OTHER MATTERS

###### The 1994 deed

1. The 1994 Mortgage Origination and Management Deed (the **1994 deed**), insofar as it remains relevant after amendment, includes the following definitions in cl 2:

“**Event of Default**” means any of the events so described in this Deed;

…

“**Participating Loan**” means a Loan made by the Trustee and introduced to the Programme by the Manager and includes any part of them;

…

“**Solicitors Certificate**” means a certificate in the form of Schedule One or such other form as is approved by the Bank from time to time issued by an Approved Solicitor that a Loan is in order for settlement;

…

“**Transaction Documents**” means the Mortgage, any guarantees and any other collateral document or security in respect of a Loan;

1. It may be assumed that Pioneer is in the position of the Manager and Columbus, after 14 August 2013, is in the position of the Bank under the 1994 deed. This was the common position of the parties and the basis on which the hearing proceeded. This position results from subsequent agreements, discussed below.
2. Clause 4.1 of the 1994 deed contains the essential obligations of Pioneer as follows:

**4.1 Introduction**

The Manager will endeavour to introduce Loans to the Bank which comply with the Terms in accordance with the provisions of this Deed, the Terms and Fees Agreement and the procedures specified in Schedule Two. The Manager must provide in writing to the Bank all information reasonably relevant to considering an Approval. The Manager must use its best endeavours to ensure that information is accurate.

The Manager must not encourage borrowers to repay a Participating Loan early or to refinance a Participating Loan.

1. Clause 5.1 of the 1994 deed is relied on by Columbus as the source of Events of Default by Pioneer by reason of Ms Dando’s fraud. Clause 5.1 provides that:

**5. MANAGEMENT OF PARTICIPATING LOANS**

**5.1 Management**

The Manager must manage all Participating Loans in an efficient and business like manner and in accordance with sound business practices, irrespective of any alleged or actual default of the Bank or the Trustee. The Manager must take such steps and maintain such procedures as would be taken and maintained by a reasonably prudent mortgagee in connection with each Participating Loan including action consequent upon any default of any Participating Loan. The Manager must comply with all laws relating to the conduct of its business including the Privacy Act.

In enforcing any Participating Loan, the Manager must retain only an Approved Solicitor for legal work and must ensure that neither the Bank or the Trustee is liable for any fee, cost or expense of any kind to which they have not given prior written consent.

1. Clause 8 of the 1994 deed deals with Events of Default and includes the following:

**8. EVENTS OF DEFAULT**

If:

(a) the Manager fails to pay any money due to the Bank on due date;

(b) there is default (other than by the Bank or the Trustee) in the performance of any term, agreement, or condition contained in or implied by this Deed, or the Terms and Fees Agreement or any other collateral document or security which if capable of remedy is not remedied within 14 days of written notice to the Manager by the Bank requiring rectification;

…

an Event of Default at the option of the Bank will have occurred. A determination by the Bank in its absolute discretion that any one or more of the above has occurred will be final and binding on the Manager and the Guarantor. The Manager must promptly inform the Bank in writing upon the happening of any of the events described in this clause.

1. Clause 9 is also relevant. It states that:

**9. TERMINATION**

**9.1 Rights on Default**

If an Event of Default occurs the Bank at its option in the manner and at the times the Bank in its absolute directions deems appropriate but without any obligation to do so and notwithstanding any omission, neglect, delay or waiver of the right to exercise such option may do any or all of the following:

(a) terminate this Deed to the intent that the Manager is no longer entitled to participate in the Programme;

(b) dismiss the Manager as manager of the Participating Loans;

(c) appoint any other person to manage the Participating Loans;

(d) take over management of the Participating Loans.

For the removal of doubt, it is confirmed that Participating Loans means all or any one or more of them. After termination, the Manager must do everything the Bank reasonably requires to facilitate the termination of the management, and the transfer of the rights, benefits, and obligations relating to the management to whoever the Bank stipulates, which may include the Bank.

**9.2 Re-Purchase of Particular Loans**

If the Manager in the opinion of the Bank fails to act in an efficient honest and businesslike manner on the introduction or management of any Participating Loan, or if the Bank determines that a Participating Loan did not comply with the Terms or the provisions of this Deed at the date the Loan was made, the Bank may by notice in writing require the Manager to purchase the Loan from the Bank. Seven days after service of this notice, the Manager must pay to the Bank the payout figure in respect of the relevant Participating Loan as determined by the Bank (the certificate of the Bank in the absence of manifest error will be final). On payment of the purchase price the Bank will cause the Trustee to transfer the Transaction Documents which relate to the Participating Loan to the Manager or its nominee. The transfer will be made at the cost of the Manager (including any stamp duty).

**9.3 Manager to Purchase Participating Loan**

If:

(a) any Transaction Document is for no reason wholly or partly enforceable;

(b) the title of any mortgaged property is in a material fashion defective or qualified other than as disclosed in the relevant Solicitors’ Certificate;

(c) a Mortgage Insurer is for any reason entitled to reduce or refuse a claim under a Primary Insurance;

(d) a Participating Loan does not comply with the Terms as applying on the Settlement Date of that Participating Loan;

the Manager must forthwith give written notice of that occurrence to the Bank and (irrespective of the giving of that notice) the Bank may by notice in writing require the Manager to purchase the relevant Participating Loan as if **clause 9.2** applied.

If any of the above occur by reason of default by the Manager, the Bank in addition or instead may exercise any of the rights specified in **Clause 9.1**.

**9.4 Termination by the Bank**

If the Bank wishes to terminate the management of Participating Loans by the Manager and no Event of Default has occurred, the Bank will give the Manager at least 40 days written notice to the Manager of that intention and the management rights will terminate on the expiry of that notice. On termination the Bank must pay or cause to be paid to the Manager the “Compensation”. The “Compensation” is the amount agreed between the Bank and the Manager and failing agreement before expiry of the notice, the “Tender Amount”. The “Tender Amount” is the amount determined by the Bank that a purchaser of the management rights approved by the Bank (which approval will not be unreasonably withheld but the Bank may require a prospective purchaser to meet certain financial requirements and be a manager approved by a Ratings Agency nominated by the Bank) would pay to purchase the management rights. The Manager and the Bank will co-operate to facilitate the determination of the Tender Amount. After termination the Manager must do everything the Bank reasonably requires to facilitate the termination of the management, and the transfer of the rights, benefits and obligations relating to the management to whoever the Bank stipulates, which may include the Bank.

1. The Programme referred to in cl 9.1(a) is defined in the recitals to the 1994 deed as follows:
2. The Bank has established a mortgage origination programme (the “**Programme**”).
3. The Manager wishes to participate in the Programme.
4. It will be apparent that although cl 9.4 of the 1994 deed allows Columbus to terminate the arrangement between it and Pioneer on notice and without Pioneer being in default, cl 9.4 also provides for Columbus to pay compensation to Pioneer if it invokes its rights under that clause. In contrast, cll 9.1 – 9.3 do not involve the payment of compensation by Columbus to Pioneer but depend on some form of fault by Pioneer.
5. Clause 10.2 relates to notices and provides as follows:

**10.2 Notices**

Any notice to be given to a party to this Deed must be given in writing and must be:

(a) sent through the post to the address specified for the party in this Deed in which case service will be deemed to be effected three Business Days after posting;

(b) delivered to or left at the address specified for the party in this Deed;

(c) sent by facsimile in which case service will be deemed to be effected upon conclusion of transmission.

A party may notify a new address in Australia to substitute for any address shown in this Deed.

###### The 1995 deed

1. The 1995 Mortgage Origination and Management Deed (the **1995 deed**) involves an arrangement by which Pioneer and PIBA entered into a contract on the same terms as the 1994 deed. By cl 2, Pioneer and PIBA agreed to “establish origination and management arrangements between themselves on the same terms as set out in the Agreements”, which are defined to include the 1994 deed. The 1995 deed also includes a guarantee, relevantly, by Mr Stefanowicz.

###### The loan agreements

1. PIBA (and subsequently ANZ) granted loans to persons introduced by Pioneer in accordance with the 1994 and 1995 deeds. The parties to the loan agreements are Pioneer First and the borrower. Pioneer is not a party to the loan agreements. Nor is PIBA (or ANZ).
2. The loan agreements contained different provisions depending on the time at which they were executed. It is common ground that the provisions of the loan agreements relating to the capacity of the party in the position of the Bank (as defined in the deeds) or the Lender (as defined in the loan agreements) fall into five main categories, albeit with some variations. The categories are as follows:

**Category A**

The Lender or the Manager on behalf of the Lender can change any of the financial information described above without your consent, including the fees and charges.

The Lender promises not to introduce any new fees and charges without your consent, except those that relate to third party costs (eg taxes, duties) and except those that relate to any change or variation to your loan.

**Category B**

The Lender or the Manager on behalf of the Lender can change any of the financial information described above without your consent, including the fees and charge.

The Lender may introduce new fees and charges without your consent.

**Category C**

The Lender or the Manager on behalf of the Lender can change any of the financial information described above without your consent. The change may include the method of calculation of interest or rates of interest, payment dates for repayments and fees and charges, and the amount of repayments. For example, the interest rate may change at any time. In addition, the Lender or the Manager on behalf of the Lender may introduce new fees and charges without your consent.

**Category D**

The Lender or the Manager on behalf of the Lender can change any of the financial information described above without your consent. The change may include the method of calculation of interest or rates of interest (but no change can be made to a fixed interest rate during a fixed rate term), payment dates for repayments and fees and charges, and the amount of repayments. For example, the standard variable interest rate may change at any time. In addition, the Lender or the Manager on behalf of the Lender may introduce new fees and charges without your consent. Provided there has been no default, and apart from those fees and charges that relate to third party costs, new services, or changes or variations to your loan, the Lender undertakes not to introduce any new fees and charges without your consent.

**Category E**

The Lender or the Manager on behalf of the Lender can change any of the financial information described above without your consent. The change may include the method of calculation of interest or rates of interest (but no change can be made to a fixed interest rate during a fixed rate term), payment dates for repayments and fees and charges, and the amount of repayments. For example, the standard variable interest rate may change at any time. In addition, the Lender or the Manager on behalf of the Lender may introduce new fees and charges without your consent.

1. It is agreed that under these provisions Pioneer First is the Lender and Pioneer is the Manager.

###### Columbus’ acquisition of the loan portfolio

1. By a deed of novation dated 14 August 2013 various agreements, including the 1994 and 1995 deeds, were novated so that Columbus replaced PIBA (referred to as Rabo in the deed of novation) in those agreements and Columbus and Pioneer continued to be bound by those agreements, Columbus being the Bank and Pioneer being the Manager as referred to in the deeds. The deed of novation records also that the completion of the sale of the Origin loan portfolio between ANZ and Columbus occurred on 28 September 2012 pursuant to a separate sale agreement. At that time Columbus, in substance, purchased the loans on the basis of the the face value of the outstanding balances.
2. Along with the deed of novation, a deed of variation was executed between Columbus, Pioneer and Mr Stefanowicz on 14 August 2013. This deed refers to the 1994 deed as the **PFC MOMD** and the 1995 deed as the **PMS MOMD**.
3. Clause 1.1 of the schedule to the deed of variation is in these terms:

1. **Fee, commission and revenue arrangements**

1.1. The following are deleted or terminated and are no longer capable of being enforced:

(a) Clause 6 of the PFC MOMD;

(b) Clause 3.1 of the Terms and Fees Agreement; and

(c) all other agreements, arrangements and understandings between, or involving any of, the Parties in respect of commission, bonus commission, margins, bonus payments and delivery rate components, management fees, and all other fee or revenue components and all other entitlements payable to the Manager,

and are replaced with the following new clauses to be inserted into the PFC MOMD:

“**6. Fees**

6.1 Manager Interest Margin

(a) Subject to clause 6.1(c), the Manager is entitled to receive a management fee equal to 1.10 percent per annum (one hundred and ten basis points) of the average loan balance of a Participating Loan from time to time throughout the period the Manager manages the Participating Loan from 1 December 2012 onwards (the Manager Interest Margin or MIM).

(b) The MIM is calculated monthly on the average loan balance of the Participating Loan for the month and is payable by the Bank monthly in arrears.

(c) The Manager is only entitled to any MIM so long as there is no Event of Default and so long as there is no money owing by the Manager to the Bank.

…

###### Reporting requirements

1. The arrangements between Pioneer and ANZ, which continued after the acquisition by Columbus, included a requirement for reporting. The reporting format included a statement as follows:

|  |  |
| --- | --- |
| **Mortgage Manager** | ### |
| **Month**(Due Quarterly by 10th April, July, October & January) | ### |

…

|  |  |  |
| --- | --- | --- |
| **Certification** | **Checked** **Yes/No** | **Provided Comments if No** |
| **LR10104 Posted Monetary Transactions**Daily reports have been reviewed and actioned in accordance with **Origin Operations Manual 10.3 Redraws**Daily reports have been reviewed and all redraw transactions (CAP codes 61067 and 60101) have been checked for correctness.Daily reports have been checked for redraws greater than $10,000.Customer authorisations are to be held by Mortgage Managers for all redraws.  | Yes |  |

1. This report was to be signed by two people – the person who prepared the report and the person who authorised the report.

###### Ms Dando’s frauds

1. There was no dispute about certain evidence regarding the frauds committed by Ms Dando in respect of three loan accounts.
2. For some time ANZ’s software system known as the Origin CAP Bureau system, to which Pioneer had access as explained below, also continued after the acquisition by Columbus.
3. On various occasions, both before and after Columbus acquired the Origin loan portfolio, Ms Dando arranged for redraws on three loan accounts (which had been paid down to a nominal amount). The funds from the redraws were transferred into an account of Ms Dando’s husband. The redraws were carried out without the knowledge or consent of the borrowers. To effect the redraws Ms Dando used the Origin Cap Bureau software system developed by ANZ and inherited by Columbus to which Pioneer (or certain employees, including Ms Dando) had access. Ms Dando did not complete any of the required paperwork for these redraws. They were recorded only in the software system. The fraudulent redraws were not discovered until 8 July 2014 when Ms Dando went on leave and one of the borrowers contacted another employee of Pioneer to challenge the amounts the borrower was said to owe under the loan.
4. According to Andrew Herring, the Operations Executive of Columbus, in evidence which was not challenged:

a. in 2011, there were 62 redraws which Pioneer Mortgage Services processed from 26 different accounts. 25 of the redraws (40%) were for loan account 120415366 being redraws for the Roberts Loan. There are also 26 redraws for the year 2011 in the Schedule of Roberts Unrecoverable Redraws set out in Annexure AH-15 of my Earlier Affidavit. The next highest volume of redraw for any one account was 3 redraws.

b. in 2012, there were 61 redraws which Pioneer Mortgage Services processed from 29 different accounts. 15 of the redraws (24.6%) were for loan account 120415366 being redraws for the Roberts Loan. There are also 15 redraws for the year 2012 in the Schedule of Roberts Unrecoverable Redraws set out in Annexure AH-15 of my Earlier Affidavit. The next highest volume of redraw for any one account was 4 redraws.

c. in 2013, there were 49 redraws which Pioneer Mortgage Services processed from 24 different accounts. 12 of the redraws (24.5%) were for loan account 120327008, 11 of these being redraws for the Angus Loan which were unauthorised. There are also 11 redraws for the year 2011 in the Schedule of Angus Unrecoverable Redraws set out in Annexure AH-16 of my Earlier Affidavit. The twelfth redraw is not being claimed by Columbus as an unauthorised redraw. The next highest volume of redraw for any one account was 5 redraws.

…The Lam & Lim Unrecoverable Redraws took place in 2006 to 2009 as follows:

a. in 2006: there were three Lam & Lim Unrecoverable Redraws;

b. in 2007: there were five Lam & Lim Unrecoverable Redraws;

c. in 2008: there were fourteen Lam & Lim Unrecoverable Redraws;

d. in 2009: there were twenty Lam & Lim Unrecoverable Redraws.

1. The money which Ms Dando took has not been recovered.

###### Pioneer’s procedures for redraws

1. Nicole Pryde, Pioneer’s Chief Operating Officer, explained Pioneer’s systems for redraws on loan accounts. In her affidavit, she said:

30. Upon the commencement of employment, an employee of the Applicant responsible for Redraws and Advances is trained by me or a training officer of the First Respondent on the use of the Origin Cap Bureau, and provided a manual to process Redraws and Advances…

31. It is my usual practice (and a practice that I instruct my subordinates to follow) to inform the employee that:

(a) all requests from borrows for redraws and advances must be in writing;

(b) all requests must be accompanied by supporting identity material;

(c) the identity material and request must be verified by the employee at the time of the request and prior to the request is being processed;

(d) all requests from borrowers must be checked by another employee of the Applicant at the time of the request for redraws or advances as the case may be.

32. On a quarterly basis, a senior employee in the position of Operations Manager and a clerk would review the items in 31(a) and 31(b).

33. The material in 31(a) and 31(b) was all material evidence in the request that was available to the Applicant. The First Respondent did not provide a receipt or reconciliation statement of the requested Redraws or Advances to the Applicant.

1. From Ms Pryde’s evidence it was apparent that she was the “senior employee in the position of Operations Manager” who carried out the review of redraws. To do so she checked a folder containing the paperwork for redraws. As Ms Dando did not complete any paperwork for the fraudulent redraws, Ms Pryde’s checks did not reveal their existence.
2. Certain facts were agreed by the parties in these terms (as recorded on the transcript):

The first fact is that access through the control D function to directly print the LR10104 or access it electronically was unavailable to the applicant after a date in 2009 due to system connection problems between the parties. The second fact is access to LR10104 was available to the applicant after that 2009 date by the applicant requesting ANZ supply the LR10104 report electronically. The third fact is that the LR10104 reports sent by ANZ by email to the applicant were in a dot txt format, which is a file format the same as that of the unzipped files in the email of which Mr Herring gave oral evidence on 23 July 2015, which email was provided to the applicant’s solicitors on the morning of 24 July 2015.

1. To explain, the LR10104 report is a report which ANZ (and then Columbus) produced via the Origin Cap Bureau software system on a daily basis which listed all transactions for that day in respect of the Pioneer loan portfolio.
2. It is apparent from the evidence that every transaction type had a unique transaction code including the kind of redraws carried out by Ms Dando without authority. The LR10104 report identified transactions, amongst other things, by reference to the applicable transaction code. Further, the dot txt format enabled a file to be searched electronically.
3. In other words, had anyone in Pioneer wished to do so, Pioneer could have obtained the LR10104 reports relating to each quarter for the Pioneer loan portfolio in an electronic format. Pioneer could have used a search function to identify all redraws on loan accounts from the LR10104 reports by using the transaction code as the relevant search term. Pioneer could then have checked that the procedures for redraws had been satisfied in respect of all those redraws. Had it done so, I am satisfied Pioneer would have discovered Ms Dando’s fraud almost immediately (in 2006). However, because Pioneer’s checking process, at least for loans under $10,000, used only the record of loans for which there was paperwork, Ms Dando’s frauds continued undetected until 2014.

###### The letter

1. On 14 November 2014 Columbus sent a letter to borrowers within the Pioneer loan portfolio as follows:

Dear <Salutation><Surname>

**RE: New Facility Fee – Home Loan Account Number <Loan ID>**

We are Origin Mortgage Management Services, a manager of your loan with Pioneer First Australia Limited.

We advise on behalf of Pioneer First Australia Limited than an annual Facility Fee of $399 per annum will be introduced on your home loan. The introduction of this fee is to contribute to the reasonable costs of the ongoing administration of your Loan Facility.

This fee will be charged on 16 December 2014 and will be due annually. The fee will be automatically added to your loan balance and will not affect any available redraw funds.

**Customer Loyalty Offset**

As you are a valued customer, to reduce the impact of the Facility Fee we are offering a Customer Loyalty Offset. This will be offered as a rate Reduction to your existing interest rate. The Rate Reduction we will be offering to your existing interest rate is 0.10% effective on 16 January 2015.

Please contact us if you have any queries.

Yours sincerely,

Origin Mortgage Management Services

1. It will be recalled that Pioneer First is the special purpose vehicle by which the party in the position of the Bank (PIBA, ANZ and then Columbus) provided loans to borrowers and is an entity under the control of the Bank party, not Pioneer.

##### COLUMBUS’ CASE – THE CROSS-CLAIM (NSD 1328 of 2014)

###### Overview

1. By way of a cross-claim Columbus contended that Pioneer breached cl 5.1 of the 1994 deed (set out above) in two ways. First, it said that the “fraudulent actions of Ms Dando are also actions of her employer, Pioneer”. Second, it said that “Pioneer did not have in place procedures of a reasonably prudent mortgagee that could have detected and/or prevented Ms Dando’s fraud” (it being recalled that cl 5.1 requires Pioneer to “take such steps and maintain such procedures as would be taken and maintained by a reasonably prudent mortgagee in connection with each Participating Loan”).
2. Columbus also contended that “Pioneer has engaged in misleading and deceptive conduct through providing to ANZ the fraudulent redraw requests with respect to the [three] loans. These online documents falsely represented that the borrowers in question had requested and authorised the redraws”.
3. It is convenient to deal with the contentions relating to Pioneer’s procedures first.

###### Procedures as would be taken and maintained by a reasonably prudent mortgagee?

Common ground

1. There was no dispute between the parties that each of the loans the subject of Ms Dando’s fraudulent redraws was a Participating Loan within the meaning of cl 5.1. Accordingly, Pioneer accepted that it was required by cl 5.1 to “take such steps and maintain such procedures as would be taken and maintained by a reasonably prudent mortgagee in connection with each” of the loans which were the subject of Ms Dando’s acts of fraud.
2. Further, it was not suggested by Pioneer that the obligation in cl 5.1 to “take such steps and maintain such procedures as would be taken and maintained by a reasonably prudent mortgagee in connection with each” of the loans did not apply to redraws. In other words, redraws were accepted to be “in connection with” the loans, in respect of which Pioneer had to take such steps and maintain such procedures as would be taken and maintained by a reasonably prudent mortgagee.

Columbus’ case on breach

1. Columbus put its case that Pioneer breached this obligation in various ways as the case developed. In its opening submissions Columbus said that:

32. The fundamental problem with Pioneer’s procedures was that Ms Dando was placed in a position by Pioneer where she could personally handle, if she so chose, all dealings between Pioneer and borrowers such as Lim & Lam, the Roberts and the Angus. This flaw in procedure was particularly egregious in circumstances in which redraws could be obtained from ANZ without any signature from a borrower but through the simple completion of an on-line form by a Pioneer employee, which form could then be forwarded to ANZ electronically.

33. Because of the above, Pioneer effectively equipped the one employee (Ms Dando) with the wherewithal to:

(a) Identify (through Ms Dando’s personal contact with borrowers and her access to their account balances) those borrowers less likely to notice fraud because their loans had previously been paid out yet were still formally on the books and available as the subject for redraws;

(b) Plausibly assert (being a point of contact between Pioneer and the borrowers in question) that the those borrowers had made redraw requests;

(c) Complete and submit redraw requests to ANZ;

(d) Avoid any audits by knowing the audit procedures and thus being able to avoid them (for example by limiting redraw amounts to less than $10,000 per redraw) and being the superior of the staff conducting such audits; and

(e) Hide any complaints made by the borrowers (Ms Dando being, if she so desired, the contact person to whom those complaints would be directed, as well as being the manager of all other staff members who could potentially be involved with such complaints).

1. The reference to audit procedures for amounts of $10,000 or more relates to the reporting requirement identified above. The form required to be completed by two Pioneer employees referred to these requirements:

 **Redraws**

Daily reports have been reviewed and all redraw transactions (CAP codes 61067 and 60101) have been checked for correctness.

Daily reports have been checked for redraws greater than $10,000.

Customer authorisations are to be held by Mortgage Managers for all redraws.

1. The parties are at issue concerning the requirement to check redraws for amounts less than $10,000, it being Pioneer’s position that there was no such requirement. As it had not yet had the benefit of the oral evidence when preparing its opening submissions, particularly the evidence of Ms Pryde, Columbus initially confined itself to the following observations about the failure to detect Ms Dando’s frauds over a period of many years. Columbus said:

36. Although Ms Pryde at [31] in her 22 December 2014 [affidavit] states that there was a system in place whereby on a quarterly basis for a “senior employee in the position Operations Manager and a clerk to review the requests and their supporting identity material”, there is no explanation as to how such checks failed to identify any of the redraw frauds (unless, consistent with Ms Lewis’ evidence, the checks were confined to redraws of $10,000 or over).

37. There is no evidence of any written redraw requests in relation to the 3 loans (let alone written requests supported by identity material) and Ms Dando’s confession of her wrongdoing did not include any claim that such material had been created. It would thus appear likely that there was no written request and no supporting identity material created to support the fraudulent redraws.

38. It follows that if the quarterly review did indeed occur, it failed to detect that the many redraw requests in relation to the 3 loans over the space of several years and totalling hundreds of thousands of dollars was unsupported by any written documentation.

1. By the time the evidence had been completed, Columbus’ contentions of a failure by Pioneer to “take such steps and maintain such procedures as would be taken and maintained by a reasonably prudent mortgagee in connection with each” of the loans included other matters, specifically based on Ms Pryde’s evidence that the checking process involved checking all redraw documents in a folder which Pioneer maintained. In other words, the checks carried out were confined to redraws for which the required paperwork had been created. Ms Dando’s frauds were committed using the software system and, it is clear from the evidence, did not involve the creation of any paperwork. Ms Pryde pointed out that, from 2009 onwards, Pioneer did not automatically receive the daily reports. As the agreed facts disclose, however, these reports were available on request in an electronic format which was searchable by reference to the two transactions codes for all redraws (CAP codes 61067 and 60101 according to the reporting form).
2. On the basis of that evidence, Columbus submitted that:

33. The fact that ANZ’s manuals contained an express requirement to undertake certain verification procedures in relation to redraws over $10,000 does not obviate the responsibility of Pioneer under clause 5.1 of the MOMD to act in an efficient and businesslike fashion and take such steps and maintain such procedures as would be taken and maintained by a reasonably prudent mortgagee. Clause 5.1 expressly states that Pioneer’s obligations remain “irrespective of any alleged or actual default of the Bank or the Trustee”.

34. Pioneer effectively acknowledged the need to review redraws below $10,000 by the fact that it had a procedure in place to make such checks, in the form of Ms Pryde’s quarterly reviews. This procedure failed in its purpose, however, due to the manner Ms Pryde conducted these reviews. Instead of checking the computer reports to see what redraws had in fact occurred and then cross-check to ensure that the written borrower requests and identity material required by Pioneer’s own procedures was present on file for each redraw, Ms Pryde merely checked Pioneer’s redraw file to see whether the documents in that file were in order, thus failing to check whether redraws had been made for which there was no paperwork at all.

35. Ms Pryde admitted that she should have checked what redraws had occurred and then looked for the paperwork for each redraw, but did not in fact do so. She admitted that this was required for her to have acted in a businesslike or prudent fashion... This is very powerful evidence of breach of clause 5.1.

36. Pioneer’s own expert, Mr Warren Williams, acknowledged that Ms Pryde’s failure to detect in her quarterly reviews that Ms Dando had made redraws for which there was no paperwork was a failure in Pioneer’s systems... Mr Williams was of the view that there needed to be at least random sample checks of redraws made at regular intervals…

37. The relevant LR10104 reports were available to Pioneer at all times either through the Control D computer system or by email request. Those reports were much shorter than the sample Aussie Home Loans report annexed to Mr Herring’s final affidavit, as Aussie managed far more loans than Pioneer. Even the emailed LR10104 reports (which were in .txt format) were searchable using the “Find” or “Control F” function present in word processors which causes, at the press of a single button, the screen to jump to the next instance of a particular set of characters. These characters can be the transaction code. There was a transaction code common to all redraws performed through CAP Bureau, making it quick and simple to check any LR10104 report for such redraws which had occurred in the period covered by that report.

1. Ms Pryde’s evidence included the following exchanges in which I have highlighted certain key matters:

MR YOUNG: So the quarterly check by client services staff was only in relation to redraws greater than 10,000. Is that right? Correct, yes.

But the monthly checks by client services and the quarterly checks by you were in relation to redraw amounts of any size. Is that correct? The monthly checks, which were also on the procedural reporting forms, were to verify redraws over $10,000.

I see. **But [y]our quarterly checks were in relation to all redraws of any amount. Is that right? Correct. Yes, all the redraws in the redraw folder.**

Because it’s necessary, isn’t it, to look at redraw amounts whether they are more or less than $10,000. You agree that that’s a prudent step that needs to be taken? I was verifying that we had customer identity which matched the redraw form that was processed and that the redraws were confirmed. A letter was confirmed back to the borrower confirming that the redraw had been processed.

**But you agree, don’t you, that it’s a vital step for Pioneer to take to check the documentation not just for redraws over $10,000, but for all redraws. Do you agree with me there? Yes.**

Yes. And that’s why you were, on a quarterly basis, making those checks. Isn’t that right? I said my reasons for checking those.

Yes, but there would have been a hole in the system if you only checked for redraws of $10,000 or more. You would agree with that, wouldn’t you? That was a requirement from Origin that we had to report. That was the basis of that procedural report.

Madam, if you can just please listen to my question and just answer my question. There would have been a hole in Pioneer systems if Pioneer had only checked for redraw amounts of $10,000 or more. Isn’t that right? No, I don’t believe so.

Now, your quarterly review was designed to plug any hole that there would otherwise have been by you checking for redraws of any amount. Isn’t that correct? My quarterly review was in relation to the whole procedural report, which also contained three other items from the support area. I was confirming that what had been verified had been actioned and the reports that had been actioned had been done and they were supplied with the report.

**But your quarterly review of redraws of any amount, that was a vital step to make sure that there weren’t any frauds taking place in relation to redraws. Isn’t that right? Correct.**

Because if one relied only on the client services monthly and quarterly reviews, that could only potentially detect frauds of $10,000 or more. You agree? Can you repeat that, please?

If one relied only on the monthly and quarterly client services checks, client services was only looking in relation to redraws of $10,000 or more, so those checks wouldn’t reveal frauds of less than $10,000. Isn’t that right? No, client services were verifying every redraw check as it was received and processed, regardless of the amount. They were checking the signatures and the identification provided. So a check was done by the client services staff when it was received and by client support. So every redraw was checked for validity.

But you’re now talking about what happens at the time the redraw is made. Isn’t that right? Correct.

Yes. **The questions I’m asking you are about the checks or reviews after the fact, and you’ve identified that there were three types of checks or reviews after the fact, being the monthly client services review, the quarterly client services review and the quarterly reviews by you. Correct? Correct.**

**Yes. And the – those three sets of checks or reviews were there, amongst other reasons, to make sure that there wasn’t any fraud in relation to redraws. Isn’t that correct? Correct.**

**Yes. And the monthly and quarterly client services reviews, they wouldn’t pick up any fraud of less than $10,000. Isn’t that correct? Correct.**

**So the quarterly reviews you were conducting were very important because they were the only after-the-event review that could potentially pick up a fraud of less than $10,000 in relation to a redraw. Isn’t that correct? Correct.**

**Now, you agree, don’t you, that in relation to all of Ms Dando’s fraudulent redraws, that there was no written borrower request. Isn’t that right? Correct.**

**And in relation to all those fraudulent redraws, there was no document with supporting identity material. Do you agree? Agree.**

So when you were conducting your quarterly reviews of all of the redraws that had happened in that quarter, whether they were greater or less than $10,000, you would’ve noticed, wouldn’t you, that in relation to the redraws on the Lam and Lim, Roberts and Angus loans that redraws had been made, but there was no written request and no supporting identity material. That’s right, isn’t it? Sorry, could you repeat that? It was quite long.

You would have noticed, wouldn’t you, during your quarterly reviews that in relation to the redraws on the Lim and Lam loan, the Roberts loan and the Angus loan that redraws had been made but the required borrower requests and supporting identity material were not on filed. Isn’t that right? No. Because the review that I did, the third review – sorry. I have just lose my train of thought. **The third review that I did was looking just at the redraw folder. It wasn’t looking at any other record or report in relation to total amount of redraws done – performed.**

**So you’re saying, madam, you didn’t actually check to see what redraws had occurred during that quarter? No. Because I was doing it every quarter to check a daily report which was the LR10104. It would have involved myself as operations manager and, following that, chief operating officer to review 90 – at least 90 days of reports in that quarterly review.**

**But there’s not that many redraws that takes place at any given quarter, are there, madam? No. But that LR10104 report did contain a number of different entries as well.**

**Yes. Well, there’s that report that you mentioned. There is a special transaction code for redraws, isn’t that correct? Correct.**

**Yes. And one can search reports like that for transaction codes. Isn’t that correct? Correct.**

**Yes. So it would have been relatively simple for you to identify what redraws had occurred at any quarter. Isn’t that correct? Correct.**

**And you could then have checked in relation to each of those redraws that the written borrower request and the written supporting identity material was present on Pioneer’s file. Isn’t that right? Correct. It was my understanding that the client services manager was reviewing those reports.**

**But only in relation to redraws of $10,000 or more. Isn’t that right? Correct.**

**You knew, didn’t you, that you were the only person who was under Pioneer’s systems potentially able to detect frauds of $10,000 or less in relation to redraws. Isn’t that right? Correct.**

**And you knew that you could only do that if you checked to see what redraws had occurred in the space of the quarter and then checked to make sure that the borrower written requests and the supporting identity material was on Pioneer’s file. Isn’t that right? Again, at that time the required verification was the redraws over 10,000 and over 50,000. And that’s what my focus was on.**

**So you were content for there to be frauds of under 10,000, right? No. At that time I wouldn’t have been content for frauds under 10,000.**

**Right. But you say you made no attempt to determine what redraws under $10,000 had occurred within a particular quarter, and then cross-checked that against the written material on Pioneer’s file. Is that right? It was my understanding that the client services manager had been checking the reports.**

**But, madam, it was your understanding that the client services manager had only been checking in relation to amounts of $10,000 or more. Isn’t that right? Yes, which was the requirement.**

**You knew that it was only your checks that could pick up frauds in relation to less than 10,000. Isn’t that right? I won’t say I knew that at the time. On reflection now, yes.**

**And you knew that only by yourself checking what redraws had occurred over the quarter and then cross-checking them against the borrower requests and supporting identity material could you check whether redraw frauds had occurred in relation to amounts of $10,000 or less. Isn’t that right? Yes.**

**But you failed to do that. Isn’t that correct? Yes.**

**And you should have done that if you were acting in a prudent and businesslike fashion. Isn’t that correct?**

[Objection – disallowed]

**MR YOUNG: And you should have done that if you were acting in a prudent or businesslike fashion. Isn’t that right, madam? Yes.**

1. Ms Pryde also gave this evidence (and again I have highlighted certain important statements):

…in paragraph 63 of your affidavit on that page, you say:

*During the course of performing my obligations as chief operating officer of the applicant, I have observed the first respondent to be the only funder that does not require a copy of the borrower’s confirmation and identification before redraws are released for payment.*

Do you see that? Yes.

Continuing:

*The first respondent was also the only funder that allowed payment direction to any account other than the borrower bank account without requesting further verification.*

You see that? Yes.

In making those comments, are you suggesting that the first respondent’s procedures were inadequate in some fashion? The system controls.

**But you’re suggesting that there was some inadequacy in the first respondent’s procedures. Is that right? Yes.**

I see. And was that something that you were – when did you first become aware of that? I knew from my experience in client services that you could, with Origin, refer to any external bank.

But you knew about these things many years ago, didn’t you? I didn’t process redraws myself.

No, but the matters you refer to in paragraph 63, these are things that you knew about and thought about before any of the fraudulent redraws took place. Isn’t that right? I didn’t know in relation to redraws. I knew for direct debits it could go to any external account.

Well? And for transfers between accounts it had to be with other lenders to pre-nominated accounts, so

But, madam, you say:

*I’ve observed the first respondent to be the only funder that does not require a copy of the borrower’s confirmation and identification before redraws are released for payment.*

You see that? **And that was something that you knew before any of the Tupeia Dando fraudulent redraws took place. Is that correct? Correct.**

I see. Now, in paragraph 64 you say:

*In my experience with the applicant, the only funder to allow us full control of the funder’s system to process redraws was the first respondent.*

You see? And then you refer to the procedure with other funders:

With the exception of ING Bank, we had to obtain a borrower written request and ID and send the request to the funder’s operations team, and they processed it in the system, or, with ING Bank, we would process the redraw, and the funds would only be paid into designated pre-nominated accounts of the borrower.

You see that? Correct, yes.

**And those were things that you knew prior to any of the fraudulent redraws that Ms Dando was involved with occurring. Isn’t that right? Yes.**

**Yes. So prior to any of the fraudulent redraws occurring, you were aware of certain matters that you thought were a defect in the first respondent’s systems in relation to redraws. Is that right? I guess I can say I didn’t see it as a risk at that time.**

**So what, you see it as a risk now but you didn’t see it as a risk then? Is that what you say? Correct.**

**I see. You would agree, wouldn’t you, if you had perceived it as a risk then that would be something that you would want to put procedures in place to head off that risk. Isn’t that right? Correct, it would have been a risk for all mortgage managers that had access to cap bureau, because any user could transfer funds to any external account.**

**Yes, but to the extent Pioneer was aware of any risks inherent in the first respondent’s redraw procedures, Pioneer would need to – in order to act in a prudent fashion, to have its own procedures to guard against those risks. Would you agree with me? Correct.**

Pioneer’s case on breach

1. Pioneer’s first answer to this part of Columbus’ case involves a pleading point. It is that Columbus pleads that Pioneer “through” the actions of Ms Dando used the software system and effected the redraws in breach of cl 5.1 of the 1994 deed.
2. As Pioneer put it, if Ms Dando acted outside the scope of her employment contract, then it cannot be said that Pioneer acted “through” Ms Dando and in breach of cl 5.1.
3. Pioneer otherwise made the following points:
4. All of the experts agree that the system which was conducted by Pioneer was a reasonable system in terms of the established procedures for redraws.
5. “In assessing whether the First Cross Respondent [Pioneer] acted in breach of contract, the operation of the CAP Bureau and its obligations thereunder must be considered. That system was the system in place at the time of fraudulent redraws and continued on until 1 October 2013. One feature of the system which was a weakness was that it was possible to go online and direct payments to a third party account. In the case, of a dishonest employee accessing the system, the only method that would go anywhere near guaranteeing that fraud could not be committed would be to have the LR10104 daily records produced by ANZ validated by cross referencing to the documentary record held by Pioneer Mortgage Services Pty Limited. The LR10104 record was available to ANZ and until 2009 it was provided to the First [Cross] Respondent [Pioneer] on a daily basis online. That arrangement ceased in 2009. Thereafter, the First Cross Respondent [Pioneer] could only obtain that report by email request”.
6. ANZ required validation of redraw requests over the sum of $10,000 only. That was the arrangement which was inherited by Columbus. “It must be taken as accepted between the contracting parties that actual validation of redraws over $10,000 was a relevant contractual requirement”.
7. There are practical difficulties associated with a validation of the daily LR10104 reports because those reports are interspersed with transactions relating to any transfers of money for whatever activities unconfined to redraw requests. The requirement to have an individual in full-time employment on the singular job of looking at daily LR10104 reports would be an unreasonable expectation of the system.
8. The fraud was carefully planned and executed. In that context, Mr Brown (Chief Executive Officer of Pioneer) said that “[t]here was really nothing that could be done by [Pioneer]”. Mr Chepul (Chief Executive Officer of Columbus) assumed that Mr Brown made this statement (T177.10). Further, he did not deny that he himself said “I agree and understand that would have been hard to spot” (T177.15).
9. The evidence of Warren Williams, an expert in mortgage services called by Pioneer, was as follows:
* It would be unreasonable to have a post-check on every transaction that a financial service institution processes.
* It was not for Pioneer to develop systems or protect the lender against possible fraud.
* The ANZ system was very limited in “outputs”. It was very hard to review and summarise the transactions that needed to be reviewed or sampled.
* The idea of identifying a person’s name in a LR10104 report that appears frequently is very difficult based on the magnitude of the transactions and that he did not understand “how you would ever do that”.

Discussion - breach

1. I do not accept Pioneer’s argument based on the pleading. It may be accepted that the “Conduct” which is said to constitute the breach of contract is pleaded to be Pioneer acting “through” Ms Dando. However, it was clear from Columbus’ opening submissions and the hearing that Columbus put its case in two alternative ways. It said that Pioneer had breached cl 5.1 either because it was vicariously liable for Ms Dando’s fraud or because Ms Dando’s fraud occurred because Pioneer did not itself “take such steps and maintain such procedures as would be taken and maintained by a reasonably prudent mortgagee in connection with each” of the loans. In these circumstances, the pleading point cannot be relied upon by Pioneer.
2. I also do not accept Pioneer’s substantive submissions. My reasons are as follows.
3. Insofar as all of the expert evidence is concerned, it appears that none of the experts understood the true nature of the quarterly check which Ms Pryde carried out. Nor did they understand what information was available to Ms Pryde in carrying out her check or how that information could be used. This is unsurprising because the details of the checking system are not readily apparent from Ms Pryde’s affidavit. In particular, the fact that her quarterly check of redraws was limited to checking the paperwork which Pioneer held in a folder and did not involve any correlation of the paperwork to the actual redraws recorded in the software system and available to be checked by the LR10104 reports was not apparent other than from her oral evidence.
4. Insofar as the evidence of Mr Williams in particular is concerned, the fact that Pioneer’s affidavit evidence did not disclose its actual systems has a number of consequences. First, and contrary to Mr Williams’ evidence, it was apparent from Ms Pryde’s oral evidence that Pioneer intended to have in place a system by which all redraws were checked after the event. That was the purpose of Ms Pryde’s quarterly check. Second, Mr Williams incorrectly believed that the reason the frauds were never detected was because Ms Dando was conducting the quarterly reviews herself. This evidence was given (again, I have highlighted the key parts):

So when you were preparing your report, you assumed it was the case that the quarterly reviews that were being undertaken of these redraws were repeatedly failing to detect the fact that redraws had taken place for which there was no supporting identity material and no written redraw requests on file. Is that right? That is correct, because I understand that the person who committed the fraud was the one doing the reviews.

I see. So you hadn’t realised that Ms Pryde was herself conducting quarterly reviews? I believe she had in her earlier part of the employment, but I believe in the later years somebody else was conducting the review.

…When you prepared your affidavit, if you had assumed that Ms Pryde herself was conducting quarterly reviews of all redraws and not just those above $10,000, looking for written borrower requests and supporting identity material, yet had failed to identify the fact that the Dando redraws had occurred but there was no such material, that would change your conclusion, wouldn’t it? Yes, that review process obviously wasn’t working.

…

**But, sir, surely you would agree if Ms Pryde’s reviews failed to detect in any quarter the Dando fraudulent redraws and failed to detect there was no paperwork for the – for redraws that had happened in that quarter, that that is a failure within the procedures of Pioneer. You would agree with that, wouldn’t you? Yes.**

1. This evidence is inconsistent with Pioneer’s submissions.
2. Third, when tested, Mr Williams’ actual evidence was that there should be both “good up front processes and appropriate checks made after the event”, even if the after event checks were not of every transaction.
3. Fourth, Mr Williams believed that not only was this software system one that provided limited “outputs” (which seems to be true) but was also “very hard to review and summarise the transactions that need to be reviewed or sampled”. Mr Williams gave evidence in this exchange (the relevant part being highlighted):

Were you aware when preparing your report that it was possible to obtain from Columbus either through a computer system or through, for individual request, report that would contain all of the redraws in a particular period? I – my view on the report that’s alleged to summarise this contains a lot of transactions, not just the redraws.

Were you aware the reports could be searched for a particular transaction code? There’s no

Are you aware of that? There’s no – what I could not see was the format of this report and **I am actually assuming the report is a printout**.

I see. So you had assumed that it wasn’t possible to search for the redraw transaction code? Not electronically.

I see. If you had assumed in preparing your report that it was possible to do that, that would have changed your conclusion, wouldn’t it? No. It would – I would suggest they would – they still should do some reviewing of their processing as part of a QA program; six monthly, 12 monthly; but I don’t believe they should be reviewing every redraw that was processed.

1. The fact is that the LR10104 reports showing every transaction were available electronically and the format in which they were available, had Pioneer requested the reports, meant the reports were able to be searched using the two relevant transaction codes for redraws.
2. Pioneer attempted to submit that requesting and using the LR10104 reports in this way would still be onerous and unreasonable due to the length of the report and number of transactions. I disagree. With the reports being electronically available, it would have been relatively easy to click through each report quickly and efficiently to locate all redraws for the quarter and cross-check all, or even a representative sample, of redraws against the paperwork. There would have been no “requirement to have an individual in full-time employment on the singular job of looking at daily LR10104 reports”, as Pioneer submitted. If this had been done it is inconceivable that Ms Dando’s frauds would not have been discovered almost immediately given the limited number of redraws on the Pioneer loans and the high proportion of the redraws which were acts of fraud committed by Ms Dando (as to which, see the evidence of Mr Herring summarised above).
3. The weakness in the software system which Columbus inherited from ANZ may be accepted. But it was a weakness of which Pioneer was aware from the outset. The existence of this weakness made it more, not less, important that Pioneer “take such steps and maintain such procedures as would be taken and maintained by a reasonably prudent mortgagee in connection with each” of the loans. I am satisfied that a reasonably prudent mortgagee would have had in place a system of checks such as Ms Pryde intended to be in place (that is, a check to ensure every redraw had the necessary documents) or, at the least, as Mr Williams believed should be in place (that is, a check of a representative sample of redraws to ensure that the object of all redraws having the necessary documents was being fulfilled). Pioneer had no such system because Ms Pryde was in fact checking only redraws for which there was paperwork. Checking redraws for which there was paperwork was not a representative or reliable sample of the redraws in fact taking place. That could only be checked by using the LR10104 reports which Pioneer knew existed, knew could be obtained on request and, based on Ms Pryde’s evidence, knew could be searched using the relevant transaction codes for redraws. Ms Pryde’s evidence that she should have done so in order to act in a “a prudent or businesslike fashion” was inevitable once it had been exposed that her quarterly check was confined to redraws for which there was paperwork.
4. The requirement of validation for redraws over $10,000, which Pioneer emphasised, does not carry much weight. First, while this was one requirement, the procedures manual also states that:

Daily reports have been reviewed and **all redraw transactions** (CAP codes 61067 and 60101) have been checked for correctness.

1. Pioneer never explained why this additional requirement should be ignored. In the face of this requirement, the quarterly review Ms Pryde carried out had to be done by reference to the “daily reports”, being the LR10104 reports. It was not.
2. Second, as her evidence discloses, Ms Pryde intended to check all redraws both more and less than $10,000. She considered it necessary to do so and, indeed, believed she was doing so by checking the folder of paperwork. In other words, Pioneer intended to have a system in place in which all redraws were checked. It may be inferred to have done so because it thought such a system reasonably prudent on its part. Regrettably, the system it implemented, which involved checking only the folder for redraws under $10,000 and not checking the daily reports “for correctness”, as the procedures manual expressly required, involved a failure to “take such steps and maintain such procedures as would be taken and maintained by a reasonably prudent mortgagee in connection with each” of the loans.
3. The evidence of the conversation involving Mr Brown (Pioneer’s Chief Executive Officer) and Mr Chepul (Columbus’ Chief Executive Officer), on which Pioneer relied, occurred after the event and in circumstances where neither appears to have known how it was that Ms Dando’s fraud had escaped detection for so long. Ms Pryde’s oral evidence alone seems to have disclosed precisely why none of Pioneer’s checks uncovered the fraud. In any event, it is clear from Mr Chepul’s evidence, which I accept, that he did not necessarily endorse Mr Brown’s assertion. In short, in the circumstances at that time, Mr Brown had every reason to make statements protective of Pioneer (which had failed to detect a continuing fraud by one of its employees for many years) and Mr Chepul had no reason to absolve Pioneer from responsibility. This makes Mr Chepul’s recollection of the conversation more likely to be accurate than Mr Brown’s recollection. Further, while Mr Chepul did not deny that he said “I agree and understand that would have been hard to spot”, it must not be overlooked that he did not actually recall saying those words. Moreover, whether or not Pioneer breached cl 5.1 is to be determined objectively and not by reference to what might have been said after the event, particularly when what was said seems not to have been based on a full understanding of why the fraud was not detected.
4. For these reasons, I accept Columbus’ case on cl 5.1 of the 1994 deed in that Pioneer did not “take such steps and maintain such procedures as would be taken and maintained by a reasonably prudent mortgagee in connection with each” of the loans. Such steps and procedures would have included a system of checks such as Ms Pryde intended to be in place (that is, a check of all redraws to ensure every redraw had the necessary documents) or, at the least, as Mr Williams believed should be in place (that is, a check of a representative sample of redraws to ensure that the object of all redraws having the necessary documents was being fulfilled). Pioneer had no such system in place.
5. Further, if the procedures manual had been complied with, Pioneer would have had in place a system by which it checked all redraws for all amounts from the daily LR10104 reports, which could readily have been done. Again, Pioneer did not have in place such a system.
6. If any of these systems had been in place, I am satisfied that the frauds would have been detected quickly. Instead, they continued undetected over many years, until Ms Dando went on leave and a disgruntled customer managed to communicate with an employee of Pioneer other than Ms Dando.
7. Accordingly, Columbus has established that Pioneer breached cl 5.1 of the 1994 deed (by which Pioneer was bound under the 1995 deed).
8. It is convenient to deal with the issue of remedies for this breach immediately (although some of the same issues arise in respect of other claims by Columbus).

###### Remedies

Overview

1. Columbus pleaded that by reason of Pioneer’s breach of cl 5.1 it was entitled to terminate the 1994 and 1995 deeds and to require Pioneer to purchase the loans which had been the subject of the fraud, and to damages.

Clause 9.1 remedies – termination etc

1. Columbus’ entitlement to terminate in reliance on cl 9.1 of the 1994 deed depends on an Event of Default having occurred as specified in cl 8. In this regard, Columbus relies on cl 8(b) which, as noted, refers to a:

…default (other than by the Bank or the Trustee) in the performance of any term, agreement, or condition contained in or implied by this Deed, or the Terms and Fees Agreement or any other collateral document or security which if capable of remedy is not remedied within 14 days of written notice to the Manager by the Bank requiring rectification.

1. Pioneer submitted that:

As a matter of the proper construction of clause 8(b), an Event of Default will only arise by reason of default in the performance of any term of the agreement (such as clause 5.1) which, if capable of remedy, is not remedied within fourteen days of written notice to the manager. In other words, it is only defaults capable of remedy but not remedied within fourteen days that will amount to an Event of Default under clause 8(b).

1. Pioneer also submitted that:

Clause 5.1 of the Deed cannot be read without regard to clause 9.2. Clause 9.2 operates if the Manager fails to act in an efficient, honest and businesslike manner on the management of any participating loan, in which the Bank by notice in writing can require the manager to purchase the loan. This strongly suggests that in the event of an alleged breach of clause 5.1 by the Manager that relates to the management of specific loans, the remedy identified by the parties themselves in the Deed is for the Bank (in this case Columbus) to avail itself of its rights under clause 9.2.

1. I do not accept that cl 8(b) applies only to defaults which are capable of remedy or that cl 9.2 requires such a construction of cl 8(b). The natural and ordinary meaning of cl 8(b), in my view, is that if the default is capable of remedy then there is no Event of Default unless and until the default is not remedied within 14 days of written notice being given. If, however, the default is not capable of remedy then there is no requirement for written notice. The Event of Default occurs immediately. In the latter circumstance, the party in the position of the Bank (Columbus) has an option whether or not an Event of Default has occurred. This option is a matter for the absolute discretion of the party in the position of the Bank.
2. Clause 9.2 does not lead to a different construction. Termination is not an automatic remedy for breach of cl 8(b). Columbus could decide whether or not to terminate and take other actions under cl 9.1. The remedy available under cl 9.2 for purchase of any particular loan would also be available to Columbus if, and only if, the requirements for that clause are satisfied. The fact that those requirements might overlap with breach of cl 5.1 is not a sufficient reason to read cl 8(b) as involving an Event of Default only if the breach is capable of remedy and has not been remedied. The provisions vesting rights in the party in the position of the Bank each operate according to their terms. For this reason, it cannot be said that cl 5.1 is an inessential term the remedy for breach of which cannot be termination. The right to terminate is given by cl 8(b) if there is default in the performance of any term of the deed. Further, it is not necessary for any notice to be served for an Event of Default to exist.
3. In the present case there has been default by Pioneer in the performance of a term of the deed, being cl 5.1. All of the remedies in cl 9.1 are thus available to Columbus. There are separate questions about the validity of various notices given by Columbus to Pioneer which arise in the context of Pioneer’s responsive case which I deal with below.

Clauses 9.2 and 9.3 remedies – re-purchase etc

1. Insofar as cl 9.2 is concerned, Columbus also claimed that it was entitled to require Pioneer to purchase the loans the subject of Ms Dando’s fraud by reason of the same facts. Clause 9.2 requires Columbus to form an opinion that Pioneer failed to act “in an efficient honest and businesslike manner on the introduction or management of any Participating Loan”. Apart from the arguments identified above, Pioneer did not suggest any reason why Columbus would not be entitled to form the required opinion that Pioneer failed to act in a businesslike manner on the management of the loans in question (its procedures against fraud being so defective, as described above) and thus require Pioneer to purchase those loans.
2. I am satisfied that Columbus is entitled to form that opinion and thus can require Pioneer to purchase the loans. There is also a separate issue as to whether Columbus has given Pioneer valid notice of the requirement to do so which I deal with in the context of Pioneer’s responsive case below.
3. I do not accept that cl 9.3 is available to Columbus. The redraw does not fall within the definition of Transaction Document so cl 9.3(a) does not apply. Columbus argued that the mortgage had become partly unenforceable to the extent of the fraudulent redraws but this consequence does not relate to any Transaction Document as defined. The definition, in my view, is confined to the initial loan. Columbus also relied on cl 9.3(b) but I do not see how the title to any mortgaged property is defective other than as disclosed in the relevant Solicitors’ Certificate by reason of the fraudulent redraws. The Solicitors’ Certificate also concerns the initial loan only and the property details which provide security for the loan.

Damages

1. Pioneer submitted that Columbus could not obtain damages for breach of contract for a number of reasons, summarised below. These submissions depend on the fact that while by the deed of novation Columbus stands in the position of the Bank under the 1994 and 1995 deeds and Pioneer continues to be bound by those deeds, Columbus did not itself acquire legal title to the loans comprising the Pioneer loan portfolio. Instead, as explained below, by legal arrangements the substance of which is not in dispute, the trustee of a trust known as the Triton Trust No 2 acquired the loans. Columbus is the sole beneficiary of the Triton Trust No 2.
2. As Pioneer put it:
3. “Columbus identifies the loss it suffered as the loss of distributions as a beneficiary of the Triton Trust. Columbus is entitled to recover loss caused by a breach of contract provided the loss is not too remote. The application of this criterion is determined by reference to the rule in *Hadley v Baxendale* (1854) 9 Ex Ch 341 at 354; 156 ER 145 at 151. The first branch of the rule requires that a reasonable person would have realised that such a loss was likely to occur as a usual consequence of such a breach. The second is that Pioneer should have realised that such a loss was likely to occur on the basis of actual knowledge of the circumstances”.
4. “There is no evidence that prior to the hearing of this case Pioneer had actual knowledge of the Sale of Debt Agreement with Rabobank, the nomination of Perpetual Corporate Trust Limited as trustee of the Triton Trust No 2 as purchaser or that Columbus was the holder of all of the units in the Triton Trust No 2. Accordingly, Columbus has not established that any alleged breach of contract by Pioneer establishes a claim for damages under the second limb in the rule in *Hadley v Baxendale*”.
5. “Perpetual Corporation Trust Limited as legal owner of the loans is the entity that suffers loss to the extent that any loan is irrecoverable. Yet it is a third party to the contract between Columbus and Pioneer. It could not sue or recover loss or damage because no consideration has moved from it and by reason of the doctrine of privity: see *Tweddle v Atkinson* (1861) 121 ER 762; [*Dunlop Pneumatic Tyre Co Ltd v Selfridge & Co Ltd*] [1915] AC 847; [*Scruttons Ltd v Midland Silicones Ltd*] [1962] AC 446. The High Court has laid down the law in precisely similar terms in *Wilson v Darling Island Stevedoring and Lighterage Co Limited* (1956) 95 CLR 43”.
6. “Nowhere in the pleading is it alleged that the loss or damage was occasioned to Columbus by reason of diminution in distributions to it as a beneficiary of a unit trust of which Perpetual Corporation Trust Limited was trustee”.
7. “…a reasonable person could not have realised that such a loss was likely to occur, namely that a fraudster would effect a series of bogus redraws and that Columbus as a beneficiary under a trust rather than the legal owner of the loans, would suffer loss. Prima facie the legal owner would be entitled to recover the loans and correlatively would suffer loss by a reason of not being able to recover the loans. Columbus’ position as beneficiary (in the absence of disclosure of its position) is too remote”.
8. Columbus answered Pioneer’s submissions in these terms:

22. As Mr Chepul makes clear in his affidavit of 17 July 2015…, the loss in relation to the Lam and Lim and Roberts loans occurred by reason of the purchase by Columbus of those loans from ANZ for the loan balance of those loans. As those loans had a purely nominal balance before the fraudulent redraws, effectively the entirety of the purchase price for those loans represented either the fraudulent redraws themselves or interest or fees charged on those fraudulent redraws. With none of that money recoverable from the borrowers in question or under the mortgage securities, that purchase money was wasted. In relation to the Angus loan, all of the funds for the redraws were paid after the loan was purchased by Columbus from ANZ, and hence it was Columbus paying the redraws and thereby suffering loss.

23. It is true that Columbus purchased the loans through a trust, but it was trust of which Columbus was the sole beneficiary. Although there were securitisation arrangements in place whereby Columbus effectively borrowed funds from other parties, the “waterfall” arrangement in terms of payments of returns was such that, as Columbus was the last to be paid it had to bear any losses itself.

24. Turning to *Hadley v Baxendale*, when an employee of Pioneer commits fraud by causing a lender to pay over money which the borrower has not requested and for which the borrower is not liable, it “may fairly and reasonably be considered ... arising naturally” from that wrong that the lender and/or any successor in title to the lender in relation to the loan will suffer a loss equal to the money paid by the lender plus interest and associated costs. Such loss also “may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as a probable result of the breach of it”.

25. The fact that Columbus acquired the loans in question through a trust of which it was sole beneficiary rather than directly does not turn the loss into “special damage” which is “too remote”. Not only is the ownership of property through a trust structure a common enough event in general, but the 1994 MOMD itself expressly refers to a situation in which either Permanent Trustee Company Limited or some other person would hold Participating Loans on trust for the lender. Thus the existence of a trustee was far from remote even that nobody would have expected, but rather the expressly contemplated means of conducting business under the MOMD.

26. In these circumstances, there is no merit at all in Pioneer’s invocation of the *Hadley v Baxendale* defence.

1. In resolving these issues the first point is that there was no suggestion that Mr Chepul’s evidence did other than accurately identify the relevant legal arrangements and their consequences. As Mr Chepul described it:
2. Before the sale to Columbus, the arrangements of ANZ with respect to the Pioneer loan portfolio also involved various trust arrangements. In summary, Pioneer First was the lender of record. It granted the loans and took the mortgages as security for the loans. Pursuant to a deed between ANZ and Pioneer First, Pioneer First held the loans and the mortgages on trust for ANZ as beneficiary. Further, ANZ also assigned its rights as beneficiary under the arrangements with Pioneer First to Perpetual Corporate Trustee Limited and Perpetual Corporate Nominees Limited.
3. Columbus is the sole beneficiary of the Triton Trust No 2. The Triton Trust No 2, the trustee of which is Perpetual Corporate Trust Limited, purchased the Pioneer loan portfolio. This structure was used because Columbus is a lender through securitisation structures (that is, while it lends or arranges for lending on individual loans backed by mortgages its business model involves accumulating sufficient loans to form a larger pool which is then able to be securitised. To do so, generally, a special purpose vehicle is created to acquire the loan pool. That vehicle is funded by the issuing of notes or bonds to investors. The notes or bonds are “backed” by the mortgages in the pool).
4. In such structures interest payments by borrowers are used to make payments in a particular order known as an interest waterfall. In short, after various payments, the securitisation funder receives the residue after all other required payments are made.
5. Columbus is the securitisation funder. Because Columbus has funded a reserve for losses sufficient to cover the amounts which cannot be recouped by reason of the fraudulent redraws Columbus will be the only party in the securitisation scheme which will suffer any loss. Loss to Columbus will be sustained either because the amounts will be covered from the reserve which Columbus has funded and/or because the residual receipts will be less in that the defrauded borrowers will not be paying interest on the fraudulent redraws.
6. The second point is that, as Columbus submitted, the 1994 deed contemplates arrangements involving a trustee. Accordingly, a “Participating Loan” is one made by the “Trustee”. The Trustee is an entity nominated by the Bank. Moreover, the 1994 deed provides in cl 7.1 that the Bank may seek to “securitise Participating Loans”.
7. In these circumstances I do not accept that the damage is too remote. In the context of the 1994 and 1995 deeds, Pioneer must have contemplated a sale of the Pioneer loan portfolio including to a securitisation funder such as Columbus. So much is plain from the capacity within the 1994 deed for the loans to be securitised. In any such case, Mr Chepul’s evidence discloses the likelihood, even inevitability, of involvement of various trusts and special purpose vehicles and the unlikelihood that Columbus itself would hold legal title to the participating loans. Loss to Columbus of the kind Mr Chepul identified Columbus has and will incur is of a kind that must have been in the common contemplation of the parties to the 1994 and 1995 deeds. As such, I do not accept that “a reasonable person could not have realised that such a loss was likely to occur, namely that a fraudster would effect a series of bogus redraws and that Columbus as a beneficiary under a trust rather than the legal owner of the loans, would suffer loss”. To the contrary, a reasonable person in Pioneer’s position when it entered into the 1995 deed (by which it agreed to be bound by the 1994 deed) would have recognised that if there was fraud on any loan account (itself a matter within reasonable contemplation) it was more likely than not that the legal owner of the loan would not suffer any loss, but that the loss would be incurred by the beneficiary for which the legal owner held title. This is precisely what has occurred.
8. To the extent it is necessary to say so, I also do not find Pioneer’s pleading point (that nowhere in the pleading is it alleged that the loss or damage was occasioned to Columbus by reason of diminution in distributions to it as a beneficiary of a unit trust of which Perpetual Corporation Trust Limited was trustee) persuasive. The hearing of this matter was expedited at the request of the parties. By the time of the hearing it was clear how Columbus put its case on damages for contractual breach, not the least from Mr Chepul’s evidence. Pioneer was able to and did put its case that the damage was too remote. Having done so, and failed, Pioneer should not now succeed on a pleading point. There is no unfairness to Pioneer from Columbus being able to rely on Mr Chepul’s evidence in support of its claim for damages.
9. There was no challenge to Mr Chepul’s evidence that the loans which had been the subject of the fraudulent redraws were purchased on 28 September 2012. For the Lam and Lim loan the fraudulent redraws occurred in the period 22 December 2006 to 13 December 2010. For the Roberts loan the fraudulent redraws occurred from 21 December 2010 to 15 June 2012. The Angus loan fraudulent redraws occurred from 20 February 2013 to 18 July 2013. Columbus paid the full face value of each of the Lam and Lim and the Roberts loans when they were acquired in 2012. In the case of the Angus loan, Columbus effected the redraws via the lender Pioneer First. In so doing Columbus suffered loss as identified by Mr Chepul.
10. Pioneer submitted that Columbus suffered no loss in another way. This argument involved a number of steps. Pioneer said that Columbus improperly engaged in a form of self-help by, first, deciding that Pioneer had breached cl 5.1 of the 1994 deed, second, serving a notice under cl 9.3 requiring Pioneer to purchase the loans, third, deciding that Pioneer breached cl 9.3 by failing to purchase the loans, and, fourth and on that basis, deciding no longer to pay management fees to Pioneer by reference to cl 6.1(c) of the schedule to the deed of variation which provides that the “Manager is only entitled to any MIM so long as there is no Event of Default and so long as there is no money owing by the Manager to the Bank”. The MIM is the Manager Interest Margin or the fees payable by Columbus to Pioneer as provided for in cl 6.1 of the schedule to the deed of variation between Columbus and Pioneer (set out above).
11. Leaving aside the issue raised in Pioneer’s proceeding which is largely responsive to the cross-claim (NSD 526 of 2015) about the validity of various notices served by Columbus, it does not follow that Columbus has suffered no loss merely because it ceased to pay management fees to Pioneer from 1 April 2015. Columbus was either entitled to cease to make such payments in reliance on cl 6.1(c) of the schedule to the deed of variation or it was not. Either way, it is not the case that Columbus’ conduct means Columbus suffered no loss.
12. For these reasons I am satisfied that Columbus has proved its entitlement to damages by reason of Pioneer’s breach of cl 5.1 of the 1994 deed.

###### Pioneer’s fraud?

Columbus’ case on vicarious liability

1. Columbus contended that Pioneer is liable for Ms Dando’s fraud and thus necessarily breached cl 5.1 of the 1994 deed in that it failed to manage the relevant loans “in an efficient and businesslike manner and in accordance with sound business practices”.
2. Columbus’ submissions conveniently summarise the principles and facts said to support Pioneer’s liability for Ms Dando’s fraud.
3. In terms of principle, Columbus submitted that:

18. An employer is responsible for the actions of an employee carried out within the scope of her employment. The mere fact that the employee’s act is a criminal act and/or expressly forbidden by the employer does not exclude the act from being within the scope of employment: *Bugge v Brown* [1919] HCA 5; (1919) 26 CLR 110 at 117 per Isaacs J.

19. Fraudulent misrepresentations made by an employee may be found to be made within the employee’s scope of employment: *Barwick v English Joint Stock Bank* (1867) LR 2 Ex 259. This is so even if the employer stood to derive no benefit from the fraud: *Lloyd v Grace, Smith & Co* [1912] AC 716.

20. In *Brockway v Pando* (2000) 22 WAR 405; [2000] WASCA 192 at [108] – [109], Malcolm CJ of the Western Australian Court of Appeal (with whom Kennedy and Murray JJ agreed) said as follows:

[108] For the purposes of determining vicarious liability, the cases do distinguish between a breach for which the employer is not liable because the breach renders the employee a stranger to his employer by virtue of his acts being an independent frolic of the employee's own outside the parameters of his duties and authority, on the one hand, and a breach which goes only to the mode of performing authorised duties, on the other. In the latter case the employer or principal is liable. *Lloyd v Grace Smith & Co* is an example. In that case, a clerk, who usually dealt with the transfers of property of clients, fraudulently transferred property to himself in the course of such a dealing. The rationale for this principle is clear. The employer (or principal) put the employee (or agent) in a position of control over the interests of people who were vulnerable to such breaches, and is therefore accountable for foreseeable losses occasioned by the employee's wrongs. As Dixon J said in *Deatons Pty Ltd v Flew* [1949] HCA 60; (1949) 79 CLR 370 [(***Deatons v Flew***)] at 381, in order to attract vicarious liability, the employee's dishonesty must consist of:

"... acts to which the ostensible performance of his master's work gives occasion or which are committed under cover of the authority which the servant is held out as possessing or of the position in which he is placed as a representative of his master."

[109] On this basis, an employer to whom goods have been conveyed as a bailee for *reward* is liable for their fraudulent conversion by an employee who steals them, so long as the employee is a person to whom the employer has delegated the duty of custody: *Morris v CW Martin & Sons Ltd* [1966] 1 QB 716. In that case, Diplock LJ said at 737 that in order to attract vicarious liability the tort must have been committed: "... in the course of doing that class of acts which the employer had put the servant in his place to do."

21. In *New South Wales v Lepore* [2003] HCA 4; (2003) 212 CLR 511 [(***New South Wales v Lepore***)], different members of the High Court enunciated different tests for vicarious liability in the case of deliberate wrongdoing by an employee- in that case a sexual assault of a student by a teacher. Callinan J was alone in finding that deliberate criminal acts could not give rise to vicarious liability. McHugh J avoided determining the question of vicarious liability.

22. Gleeson CJ, and Gaudron and Kirby JJ considered the tested depended upon the “connection” between the wrongful act and the employment of the employee. Gleeson CJ at [74] asked whether there is a “sufficient connection between what a particular teacher is employed to do, and sexual misconduct, for such misconduct fairly to be regarded as in the course of the teacher’s employment”. Gaudron J at [130] – [131] cast the test as one of estoppel against the employer denying the employee was acting as a servant or agent, stating that

Ordinarily, a person will not be estopped from denying that a person was acting as his or her servant, agent or representative unless there is a close connection between what was done and what that person was engaged to do.

23. Kirby J at [315] – [320] proposed a “sufficiently close connection” test, stating at [318] (with footnotes omitted):

...where the employment “*materially* and *significantly* enhanced or exacerbated the risk of [the tort]” or where there is a significant connection between the creation or enhancement of the risk and the wrong that it occasions within the employer’s enterprise; or alternatively, where the conduct may “*fairly and properly be regarded* as done [within the scope of the employment]”.

24. In their joint reasons, Gummow and Hayne JJ, [a]t [231] their Honours stated:

First, vicarious liability may exist if the wrongful act is done in *intended pursuit* of the employer’s interests or in the *intended performance* of the contract of employment. Secondly, vicarious liability may be imposed where the wrongful act is done in *ostensible pursuit* of the employer’s business or in the *apparent execution of authority* which the employer holds out the employee as having.

25. Gummow and Hayne JJ proceeded at [235] to comment specifically about applying the above analysis to cases of fraud, continuing:

The commission of a fraud can seldom be said to have been in the intended performance of the employee’s duties. In those cases, however, it will often be the case that what was done by the employee was done in the apparent execution of authority actually, or ostensibly, given to the employee by the employer.

1. In response to Pioneer’s reliance on *Deatons v Flew*, in which an employer was held not to be liable for an employee throwing a glass at a customer in anger, Columbus made three points. First, the facts are different (as to which, see below). Second, the facts of the present case satisfy the requirement expressed by Dixon J in *Deatons v Flew* at 381 – 382 that the fraudulent acts were done within the scope of Ms Dando’s express or implied authority and as an incident of her employment. Third, the law has developed since *Deatons v Flew* as the reasoning in *New South Wales v Lepore* discloses.
2. Columbus also submitted that *Lloyd v Grace, Smith & Co* [1912] AC 716 (***Lloyd v Grace, Smith & Co***) did not assist Pioneer. As Columbus put it:

That case demonstrates that when an employee defrauds a client of money by undertaking actions similar to those the employee carries out in his or her employment the employer is also liable. The submission by Pioneer that this is not the case if the employee assaults the customer or steals from the customer’s wallet is to no avail- Ms Dando’s actions did not involve assault or pick-pocketing but using the very procedures and computer systems she was trained in and given access to in the course of her employment.

Pioneer’s case on vicarious liability

1. Pioneer submitted that Ms Dando’s frauds were outside the scope of her employment. At 378 – 379 in *Deatons v Flew* Latham CJ said:

The liability of the employer depends upon the scope of employment of the barmaid and the authority which her employment conferred upon her, such authority to be exercised on behalf of the employer. An employer is liable for the act of his servant only if the act is shown to come within the scope of the servant’s authority either as being an act which it was employed actually to perform or as being an act which was incidental to his employment….

…

But throwing beer in the face of a customer simply was not a means of keeping order, nor in my opinion, can it be said that such an action is incidental to the work which the barmaid was employed to do…. the act was an act of personal resentment and was not in any way performed as on behalf of the employer.

1. At 381 – 382 Dixon J said:

The truth is that it was an act of passion and resentment done neither in furtherance of the master’s interests nor under his express or implied authority nor as an incident to or in consequence of anything the barmaid was employed to do.

1. As Pioneer put it, Ms Dando’s employment was merely the occasion for her fraud and no more.
2. Pioneer submitted that *Lloyd v Grace, Smith & Co* discloses that it is the nature of that which the employee is employed to do on behalf of the employer that determines whether the wrongdoing is within the scope of employment. In that case, the principal was liable because the fraudulent clerk was acting within the scope of his delegated authority to deal with title deeds. The facts of the present case are different. Nor were Ms Dando’s acts sufficiently closely connected with her employment, in the sense discussed in *New South Wales v Lepore*, to make Pioneer liable for her criminal conduct. Ms Dando’s actions were not an improper mode of effecting a redraw by a customer but “outright theft”.

Discussion – vicarious liability

1. It is necessary to say something about the facts. Pioneer submitted that Ms Dando was not authorised to effect redraws on behalf of customers. Columbus submitted to the contrary.
2. Pioneer’s proposition is an over-simplification. Ms Dando was Pioneer’s Client Services Manager. Employees who reported to Ms Dando routinely effected redraws on loans as part of their responsibilities. As Columbus submitted:

A manager such as Ms Dando, however, not only has all the authority and access to equipment and systems of her underlings, but also the additional authority and access that comes with the role of manager.

1. This proposition was supported by the evidence of Ms Pryde in cross-examination the effect of which, as Columbus said, was that “Ms Dando was authorised to make customer redraws, it was merely the case that after being promoted to a managerial role she performed such redraws only as a training exercise for staff or if required to fill in due to staff shortages”.
2. The evidence also leaves no room for doubt about the accuracy of Columbus’ submissions that:

ANZ had provided Pioneer with access to the CAP Bureau system as a means, inter alia, for Pioneer to make redraw requests. Access to CAP Bureau was not a system available to members of the general public, but rather a special means of electronic communication available for use by such Pioneer staff that Pioneer authorised to use it. Ms Dando could only access the CAP Bureau system because she was an employee of Pioneer authorised by Pioneer to use the system.

1. One difference between the facts of the present case and those in *Lloyd v Grace, Smith & Co* is that in *Lloyd v Grace, Smith & Co* a client had requested the sale of her properties. The dishonest clerk committed his fraud in the course of purporting to convey the properties on the client’s behalf when, in fact, he conveyed them to himself. In the present case the customers had not requested a redraw. They held loan accounts with Pioneer First which, although drawn down to nominal amounts, remained active. Ms Dando, without their knowledge, used her access to the CAP Bureau system to effect redraws on funds on their accounts, the money being transferred from the lender into an account of Ms Dando’s husband. In so doing, she acted contrary to her employer’s requirement that redraw requests be in writing. However, this is no different from the fact that the dishonest clerk in *Lloyd v Grace, Smith & Co* must be taken to have acted contrary to his employer’s requirement that he not dishonestly transfer client’s property to himself.
2. In these circumstances I accept Columbus’ submissions that Ms Dando’s fraud:

(a) was given occasion to by her work at Pioneer as Client Services Manager, which equipped her with all of the knowledge, computer access authority and other assets required to perpetrate and then cover-up the fraud;

(b) was committed under cover of the authority vested in her by Pioneer to forward, on Pioneer’s behalf, redraw requests to the lender;

(c) was in the course of doing that class of acts which Pioneer had put Ms Dando in her place to do, being the management of redraw payments to borrowers;

(d) was closely connected with her employment;

(e) there was significant connection between the creation or enhancement of the risk as a result of Ms Dando’s employment;

(f) was performed in ostensible pursuit of Pioneer’s business; and

(g) was performed in apparent execution of the authority Pioneer held Ms Dando out as having.

1. In this regard it must be recognised that although the customers did not have any dealings with Ms Dando (unlike the client in *Lloyd v Grace, Smith & Co*), a relevant relationship in the present case is that between Pioneer and the lender, Pioneer First (the special purpose company under the control of ANZ and then Columbus). Insofar as the lender is concerned, Ms Dando had the requisite authority to effect the redraws. She had that authority because Pioneer had given her access to and the capacity to use the CAP Bureau system to effect redraws. Moreover, insofar as the lender is concerned, Ms Dando was effecting the redraws as part of Pioneer’s business. Once these facts are taken into account, Columbus’ submission that the facts are different from *Deatons v Flew* but not relevantly distinguishable from *Lloyd v Grace, Smith & Co* becomes difficult to refute.
2. For these reasons, I accept Columbus’ submission that:

whatever the precise test for scope of employment in the context of vicarious liability in the case of the fraud of an employee, the test is satisfied in the present case.

1. I am not persuaded that this conclusion involves pitching Ms Dando’s duties “so high as to pre-empt the issue” (*New South Wales v Lepore* at [51]), as Pioneer suggested. The connection between Ms Dando’s fraud and her duties, in my view, is extremely close and supports Columbus’ case that Pioneer is liable for its employee’s actions, despite those actions being criminal in nature and involving a deliberate breach of Pioneer’s requirement that all redraws be the subject of a written request. Further, and as I have said, insofar as the relevant other party is concerned (being the party in the position of the Bank under the 1994 and 1995 deeds), the actions of Ms Dando were undertaken in ostensible pursuit of Pioneer’s business and in the apparent execution of authority which Pioneer had held out to the Bank and which Ms Dando, in her role as Client Services Manager, enjoyed. This accords with the requirement identified in *New South Wales v Lepore* at [232] that:

It is the identification of what the employee was actually employed to do and held out as being employed to do that is central to any inquiry about course of employment.

1. It follows that Pioneer breached its obligation in cl 5.1 of the 1994 deed to manage the relevant loans “in an efficient and businesslike manner and in accordance with sound business practices”.
2. The discussion above relating to Events of Default and remedies for breach applies also to these breaches.

###### Misleading and deceptive conduct?

1. Columbus contended that, by reason of the same matters as set out above, Pioneer engaged in misleading and deceptive conduct because it represented to ANZ and then Columbus, falsely, that the customers had requested and required each of the redraws, had authorised payment to the account into which the money was paid, and that Ms Dando was authorised by the customer and Pioneer to request payment from ANZ and then, as relevant, Columbus (for the Angus loan redraws). Columbus pleaded these representations as having been made by Pioneer “through” Ms Dando, an issue discussed above in the context of the contractual claims, but which Pioneer relies on in another way as well.
2. Leaving aside this argument on Pioneer’s behalf, nothing said by Pioneer undermined Columbus’ case that these representations were in fact made, were false, and were relied upon by ANZ and Columbus. Rather, Pioneer’s case (insofar as matters have not already been determined against it), relies upon s 84(4) of the *Trade Practices Act 1974* (Cth) (as continued in force by the *Trade Practices Amendment (Australian Consumer Law) Act (No 2)* *2010* (Cth), which is in the same terms as the *Competition and Consumer Act 2010* (Cth)), although it seems that s 84(2) is the relevant provision. Section 84(2) provides that:

Any conduct engaged in on behalf of a body corporate:

(a) by a director, employee or agent of the body corporate within the scope of the person's actual or apparent authority; or

(b) by any other person at the direction or with the consent or agreement (whether express or implied) of a director, employee or agent of the body corporate, where the giving of the direction, consent or agreement is within the scope of the actual or apparent authority of the director, employee or agent;

shall be deemed, for the purposes of this Act, to have been engaged in also by the body corporate.

1. Pioneer said that the acts of Ms Dando were criminal and contrary to Pioneer’s express instructions (I infer, to the effect that all redraws must be the subject of appropriate paperwork including a written redraw request by the customer) and thus could not be “on behalf of” Pioneer.
2. Columbus submitted, and I accept that:

4. The expression “on behalf of” in s 84 of the Trade Practices Act has had judicial consideration. Lindgren J in *NMFM Property Pty Ltd v Citibank Ltd* (No 10) [2000] FCA 1558 at [1244]; (2000) 107 FCR 270 at 550 stated that:

It seems to me that an act is done “on behalf of” a corporation for the purpose of sub-s 84(2) if either one of two conditions is satisfied: that the actor engaged in the conduct intending to do so “as representative of” or “for” the corporation, or that the actor engaged in the conduct in the course of the corporation's business, affairs or activities.

5. In *Downey v Carlson Hotels Asia Pacific Pty Ltd* [2005] QCA 199, Keane JA (with whom the other judges agreed) cited the above passage from the judgment of Lindgren J and stated at [59]:

An act is done “on behalf of” a corporation for the purposes of s 84(2) of the Act if the actor “engaged in the conduct in the course of the corporation's business, affairs or activities”.

6. It follows that the test under the Trade Practices Act for performing an act “on behalf of” a corporation is more widely cast that the test under the law of vicarious liability, as the expression includes any act engaged in the conduct in the course of the corporation's business, affairs or activities.

1. Consistent with the reasoning above, Ms Dando committed her fraudulent acts as a representative of Pioneer and in the course of Pioneer’s business. Accordingly, Ms Dando’s misrepresentations are taken to be those of Pioneer and Pioneer is also liable on this basis.

###### Liability of Mr Stefanowicz?

1. Columbus’ cross-claim seeks relief against all cross-respondents, Pioneer, Mr Stefanowicz and Ms Dando (who did not appear). In the accompanying statement of claim it is pleaded that Mr Stefanowicz guaranteed the obligations of Pioneer under the 1995 deed. The only basis on which Mr Stefanowicz is claimed to be liable is as guarantor of Pioneer’s obligations under the 1995 deed (and, therefore, the 1994 deed). Contrary to Pioneer’s submission, it is clear from the originating application read with paragraph 7 of the statement of cross-claim that Columbus alleged Mr Stefanowicz was liable in his capacity as guarantor.
2. By cl 5(a) of the 1995 deed Mr Stefanowicz agreed to guarantee the obligations of Pioneer as follows:

The Guarantor guarantees to PIBA due and punctual performance by PMS (the “Manager”) of the Manager’s obligations under this Deed and indemnifies PIBA against all loss, damage, costs and expenses suffered or incurred by PIBA because of any failure by the Manager to pay any of the Deed Money or any breach by the Manager of any of the terms of this Deed.

1. By the deed of variation Mr Stefanowicz and Columbus agreed in cl 3(5) that:

In respect of any guarantee Stefanowicz has given pursuant to a Principal Document (“**Guarantee**”) the parties acknowledge and agree that:

(a) The Guarantee shall not apply in respect of all and any facts, matters or circumstances arising after the Effective Date (“**Future Matters**”).

(b) Stefanowicz is hereby released from all and any obligations under the Guarantee in respect of Future Matters; and

(c) The Guarantee shall remain in force and effect in respect of all and any facts, matters or circumstances arising on or prior the Effective Date.

1. Pioneer submitted, on this basis, as follows:

As a matter of the construction of the Deed of 14 August 2013 and having regard to context including the 1995 MOMD, clause 3(5) was intended to release Stefanowicz from any obligations whatsoever on or after 14 August 2013. The Dando fraud matters and fraudulent redraws were all facts, matters of circumstances arising after 14 August 2013 since they were unknown to the parties prior [to] that date and since, as a matter of construction, any obligation of Stefanowicz under the guarantee was to cease after 14 August 2013.

1. Columbus submitted that:

The last of the fraudulent redraws occurred on 18 July 2013. Thus the claim against Mr Stefanowicz is in respect to facts, matters and circumstances occurring exclusively before 14 August 2013, being the fraudulent redraws and Pioneer’s breach of the MOMD by reason of its part in those redraws. Thus the limited release provided in the 14 August 2013 Deed of variation does not save Mr Stefanowicz from Columbus’ claim pursuant to his guarantee.

1. It will be apparent that the difference between the parties is that Pioneer’s position is that “all and any facts, matters or circumstances arising after the Effective Date” (so-called Future Matters) includes the discovery of fraud after the Effective Date. Columbus’ position is that as the acts of fraud occurred before the Effective Date those acts of fraud, whether known about or not, are not within the scope of “all and any facts, matters or circumstances arising after the Effective Date” with the consequence that Mr Stefanowicz is not released from liability under his guarantee in that regard.
2. The parties did not favour me with any assistance on the principles of construction which should be applied to guarantees. In *Paradise Constructors Pty Ltd v Lofts Quarries Pty Ltd* [2003] VSC 370 at [38] Dodds-Streeton J noted that:

The predominant modern approach to the construction of contracts of guarantee is to construe guarantees negotiated by business people according to a reasonable commercial meaning [*Ankar Pty Ltd v National Westminster* (1987) 162 CLR 549 at 560-561; O’Donovan, J. and Phillips, J., *The Modern Contract of Guarantee,* 3rd edn, 1996 at pp. 216-218]. The strict approach of older authorities (which stressed a limitation of the guarantor’s obligations to that expressly undertaken on a strict construction of the instrument) [*Eastern Countries Building Society v Russell* [1947] 1 All ER 500] has, in appropriate cases, been displaced.

1. In any event, and as explained below, I do not consider there to be much scope for any construction in favour of Mr Stefanowicz.
2. The effect of Pioneer’s submission is that the deed of variation releases Mr Stefanowicz from his guarantee other than in respect of matters known to the parties before the Effective Date. If Columbus and Mr Stefanowicz had intended this result then cl 3(5) is an odd way to achieve it.
3. Further, knowledge is not an element of any cause of action on which Columbus relied. Columbus suffered loss when it paid for the purchase of the Pioneer loan portfolio on the basis of the loan amounts and when it arranged for the funds to be transferred on the Angus loan after that purchase, irrespective of its lack of knowledge of such loss at that time. Ms Dando’s acts of fraud and misrepresentation, for which Pioneer is liable, are not “facts, matters or circumstances arising after the Effective Date”.
4. Read in the context of the legal arrangements between Pioneer and Columbus (having regard to the deed of variation), the relevant “facts, matters or circumstances” are those by reason of which Mr Stefanowicz might be liable under the guarantee, being facts, matters or circumstances by which Pioneer failed in its obligations of due and punctual performance under the 1994 and 1995 deeds, or failed to pay any of the money owed under the deed, or breached any of its obligations under the deed. At least insofar as Pioneer’s breaches of cl 5.1 of the 1994 deed and misrepresentations are concerned (and leaving aside any issue relating to Columbus’ subsequent service of notices requiring Pioneer to purchase the loans), Pioneer was liable to Columbus for those matters at the time each act of fraud was complete or at the time of purchase of the loans on 28 September 2012. Either way, these dates are before the Effective Date.
5. Pioneer’s submission can be tested this way. Assume Pioneer discovered Ms Dando’s fraud before the Effective Date yet did not disclose the fraud to Columbus until after the Effective Date. Columbus’ knowledge is then a fact, matter or circumstance arising after the Effective Date. Why, on Pioneer’s argument, would that not be within the scope of its construction of “all and any facts, matters or circumstances arising after the Effective Date”?
6. In my view, the proper construction of cl 3(5) starts with acceptance that relevant facts, matters or circumstances are those which may make Mr Stefanowicz liable under the guarantee. Those facts, matters or circumstances concern Pioneer failing in its obligations of due and punctual performance under the 1994 and 1995 deeds, failing to pay any of the money owed under the deed, or breaching any of its obligations under the deed. If any such failure or breach includes knowledge of the parties as an essential element before it can be said that there is a failure or a breach, then knowledge before the Effective Date is required. If any such failure or breach occurs irrespective of the knowledge of the parties, then knowledge before the Effective Date is not required. In the present case, the causes of action on which Columbus relies are not dependent on knowledge. It follows that Mr Stefanowicz is liable under his guarantee for Pioneer’s breaches of contract.

###### Another pleading point

1. In submissions in reply filed after the completion of the hearing, Pioneer raised a point which was not in reply and which had not been previously articulated in any clear way. Pioneer said:

Columbus in its pleadings fails to state all of the material facts necessary to constitute a complete cause of action against either or both Pioneer and Mr Stefanowicz: see *Polar Aviation Pty Ltd v Civil Aviation Safety Authority* [2012] FCAFC 97; (2012) 203 FCR 325; *Bruce v Odhams Press Limited* [1936] 1 All ER 287; [1936] 1 KB 697; *Do Carmo v Ford Excavations Pty Ltd* [1984] HCA 17; (1984) 154 CLR 234.

1. I do not consider it open to Pioneer to attempt to make this point in this way. If Pioneer wished to claim that Columbus’ pleading of the cross-claim was so defective that no relief could be granted on the cross-claim, the point needed to have been made clearly in a pleading or, at the least, in clear terms at the outset of the hearing. The point was not made in a pleading. Reliance cannot be placed on Pioneer’s defence to the cross-claim on this issue. First, it says nothing about the alleged deficiency. Second, it contains many arguments that were not pressed at all during the hearing and thus must be taken to have been abandoned. Nor, in my view, was the point made sufficiently clearly during the hearing (mere passing reference in a written submission or opening being insufficient for this purpose).Accordingly, the issue should not be permitted to be raised.

###### Conclusions

1. For the reasons set out above Columbus has effectively succeeded in its cross-claim and orders should be made accordingly.

##### PIONEER’S RESPONSIVE CASE (NSD 526 OF 2015)

###### Overview

1. As noted, in proceeding NSD 526 of 2015 Pioneer seeks declarations and orders which, in large part, are responsive to and overlap with Columbus’ cross-claim.
2. Accordingly, many of the issues in proceeding NSD 526 of 2015 have been resolved as part of Columbus’ cross-claim. It is not necessary to give details other than to record that the relief sought in grounds 1, 2, 6, and 7 concerns Pioneer’s liability for Ms Dando’s frauds which has been determined against Pioneer. The relief sought in grounds 3 and 4 concerns cl 9.3 of the 1994 deed which has been determined against Columbus (but, as the cl 9.2 issue was determined in favour of Columbus, this point seems immaterial). The relief sought in grounds 5 and 8 to 10 relates to the notices Columbus served on Pioneer which have not been considered as yet. Grounds 12 and 13 relate to Columbus ceasing to pay management fees to Pioneer which also remains to be considered. The relief sought in grounds 15 and 16 also relates to the notices but is framed as a claim for misleading or deceptive conduct. The relief sought in ground 17 also relates to the notices but is framed as an unconscionable conduct claim.
3. To the extent that Pioneer claimed the notices served by Columbus were invalid or misleading and deceptive because Pioneer was not in breach of any legal obligation, the claims must be rejected for the reasons given above. Pioneer’s other arguments about the validity of the notices are discussed below. Similarly, I do not accept Pioneer’s submission that any notice is invalid because it did not require the breach to be remedied as referred to in cl 8(b) of the 1994 deed. As discussed above, where a breach was incapable of remedy, as in the case of the breaches of cl 5.1, Columbus was entitled to treat each breach as an Event of Default.

###### The notices

1. **The 22 July 2014 notice**: this letter from Columbus to Pioneer is not a notice of an Event of Default. It is a communication to the effect that Columbus considered that such an event had occurred but was considering its position. As such, cl 10.2 of the 1994 deed is immaterial. A letter of this kind is not a notice at all and there is no purpose in characterising it as invalid. In any event, as Columbus submitted in respect of cl 10.2:

…there is no evidence that the 22 July 2014 notice was not served by mail. The fact that the notice has on the front page the words “By email” and states Mr Brown’s address suggests it was initially forwarded by email (as Ms Pryde’s evidence confirms), but that does not mean it was never sent by post. As the validity of the notice is only an issue in proceedings 526 of 2015, Pioneer bears the onus of proof on this point, but have not discharged that onus by demonstrating that the only service was by email.

1. **The 18 December 2014 notice**: this is a notice under cl 10.2.
2. Pioneer’s service point should be rejected for the reasons given in respect of the 22 July 2014 letter – Pioneer bears the onus and has not proved the notice was not served as required. Further, and as Columbus said, the alleged lack of service as required by cl 10.2 cannot be sustained given that Ms Pryde said she had received this notice by facsimile.
3. The notice confirms that Columbus had determined, as I have found it was entitled to do, that an Event of Default had occurred. The fact that this notice refers to a period of 14 days having passed without remedy is immaterial because the Event of Default (or Events) were not capable of remedy. Columbus also gave notice that it required Pioneer to purchase the loans under cl 9.2 of the 1994 deed. Again, I have found Columbus was entitled to require purchase based on this provision. I do not accept that in so doing Columbus elected not to terminate the 1994 and 1995 deeds. Columbus reserved its rights otherwise and this necessarily included its rights to terminate under cl 9.1 which are additional to its rights to require a re-purchase under cl 9.2. No election was required or made by Columbus.
4. That said, I accept that this notice does not specify a payout figure as referred to in cl 9.2. I do not accept Columbus’ submission that the notice was effective for the purposes of cl 9.2 because the “current outstanding balances of the loans were readily ascertainable by Pioneer through the relevant computer systems (being the Coral system by December 2014) and hence there was no need to state those figures directly in the notice”. While this may be so it was for Columbus to identify the payout figure. Moreover, Columbus required payment of fees, charges and other amounts incurred by it, which were unknown.
5. I do not consider that this means the notice is “invalid”. All it means is that the notice did not require Pioneer to pay the payout figure to Columbus within seven days after service of the notice. As such, Pioneer was not in breach of cl 9.2 when it did not do so.
6. **The 23 March 2015 notice**: this notice relies on cl 9.3 of the 1994 deed. I have found above that Columbus was not entitled to rely on this clause. Accordingly, Pioneer was not in breach of cl 9.3 when it did not purchase the loans in response to this notice. Again, the notice is not invalid; it is simply ineffective.
7. **The 1 April 2015 notice**: this notice adds nothing to what has gone before and nothing need be said about it.
8. The relevant consequence of these conclusions is that Columbus’ argument that it was entitled to cease payments under the deed of variation because Pioneer had not purchased the loans as required and thus, by cl 6.1(c), there was money owing by Pioneer should not be accepted. However, this is immaterial because cl 6.1(c) provides that Pioneer (being the Manager as defined) is “only entitled to any MIM so long as there is no Event of Default and so long as there is no money owing by the Manager to the Bank”. By 18 December 2014 Columbus had determined that an Event of Default had occurred. Columbus was entitled to do so. From that time Pioneer was not entitled to be paid any management fees in accordance with the terms of cl 6.1(c).

###### Other matters

1. Pioneer’s claims of misrepresentation and misleading and deceptive conduct by reason of the notices, as discussed, are misconceived insofar as they depend on Pioneer’s position that it was not in breach of cl 5.1. The only notice which Columbus served which I consider was not properly founded on Columbus’ contractual rights is that of 23 March 2015. The fact that the notice was not properly founded on Columbus’ contractual rights does not mean that the notice was misleading and deceptive. Pioneer was not misled in any way. It responded to the 23 March 2015 and 1 April 2015 notices by denying any obligation to comply with the notices. As such, the claims for misleading and deceptive conduct based on the notices are immaterial and time should not be wasted on them in these reasons for judgment.
2. Pioneer also submitted that:

By pleading an entitlement to terminate but without seeking to have an adjudication of that right by specifying a remedy, and instead engaging in conduct refusing to pay management fees, the conduct of Columbus does infringe the principles enunciated in *Cinc v Bucan Holdings* [*Pty Ltd* [2004] NSWSC 847]. This is another basis upon which its entitlement to refuse to pay the management fees should be rejected.

1. As Columbus noted:

… during the course of the interlocutory application by Pioneer in April that followed the service of the 1 April 2015 letter by Columbus, counsel for Columbus pointed out in open court that Pioneer sought no order mandating on an interlocutory basis the continued payment of management fees and that in the circumstances Columbus would not be paying those fees. There was no change to the interlocutory orders sought by Pioneer despite that announcement. Neither abuse of process nor contempt can be credibly alleged in those circumstances.

1. Pioneer’s submission is that it is an abuse of process for Columbus to have stopped paying management fees when this was an issue to be determined in proceeding NSD 526 of 2015. I do not see *Cinc v Bucan Holdings Pty Ltd* [2004] NSWSC 847 as supporting this proposition. In *Cinc v Bucan Holdings Pty Ltd* Campbell J summarised the relevant principles in these terms:

[32] In this other line of authority, the superior court acts to prevent an abuse of *its own* process, not an abuse of the process of an inferior court or tribunal. The power of a superior court to prevent the abuse of its own process is wide. Many examples are given in Mason, ‘The Inherent Jurisdiction of the Court’ (1983) 57 ALJ 449 at 453–456. That power authorises the superior court to make Mareva orders preventing a litigant from disposing of assets pending a hearing, as a means of protecting its own process from abuse in relation to the enforcement of its orders: *Jackson v Sterling Industries Ltd* (1987) 162 CLR 612 at 619 , 621 , 623 , 634 , 638–9; *Cardile v LED Builders Pty Ltd* (1999) 198 CLR 380 at 393. It enables the superior court to punish a litigant in that court who, by action out of court, seeks to get an advantage concerning the litigation which the processes of the court do not permit him to have, or engages in conduct which interferes with the administration of justice by the court in which the litigation is occurring: *Brambles Holdings Ltd v Trade Practices Commission (No 2)* (1980) 44 FLR 182 at 192–4; *Pioneer Concrete (Vic) Proprietary Ltd v Trade Practices Commission* (1983) 152 CLR 460 at 467–8 , 473. It enables the court to make orders to undo what has been achieved by a person who is litigating in the superior court and who engages in a

… devious stratagem designed to achieve the result which it had sought to achieve in the proceedings, but which, at the time of its adopting that stratagem, it had not achieved by Order of the Court.” (*Howse Fink and Johnson Computing Services Pty Ltd v Beard* (Supreme Court of NSW, 26 October 1989 unreported), per Powell J.

[33] As Young J said in *Eagle Star Trustees Ltd v Tai Ping Trading Pty Ltd (No 2)* (Supreme Court of NSW, 30 October 1990, unreported), at 8:

There is good authority for the proposition that if a party seeks to obtain a right by Court proceedings, then it is a contempt of Court to seek to obtain that which is apparently not being gained in the Court proceedings by some other route whilst those proceedings are still on foot. Although the principle seems to me to be quite clear, it is difficult to find a precise expression of it. It can be seen, however, in operation in cases where a person who has obtained a decree of specific performance of a contract for the sale of land is not permitted to terminate such contract without the approval of the Court. Even though the Court’s decree merely is that the contract be carried out and the parties contractual rights remain, because the parties have submitted themselves to the Court’s procedure, they are bound only to act in accordance with its order.

[34] Another means by which a superior court protects the integrity of its own processes, without directly invoking the notion of abuse of process, is by regarding a litigant who has committed a particular topic to the Court for decision as having elected not to use extra-curial means to achieve the same objective as the application to the court was seeking to achieve: *Argyle Art Centre Pty Ltd v Argyle Bond & Free Stores Co Pty Ltd* [1976] 1 NSWR 377 at 386.

1. The key matter in the present case is that cl 6.1(c) of the schedule to the deed of variation provides that Pioneer was not entitled to be paid management fees if there was an Event of Default. By cl 8 of the 1994 deed this was a matter for Columbus to determine. Having so determined on 18 December 2014, Pioneer had no entitlement to management fees from that date. Columbus was within its rights to cease paying the fees from 1 April 2015 onwards. The fact that the issue was in dispute did not mean Columbus had to keep paying fees while the issue was being resolved in proceeding NSD 526 of 2015. If Columbus was right, its decision would be vindicated. If Pioneer was right, Columbus would be in breach. There was no abuse of this Court’s process in those circumstances.
2. Moreover, Columbus did not seek any relief in respect of Pioneer’s lack of entitlement to be paid management fees. Columbus thus did not elect to have this issue resolved by the Court. Pioneer put the issue before the Court because Columbus had decided to and had in fact stopped paying management fees. Pioneer’s case thus involves the proposition that to avoid an abuse of process Columbus needed to start paying management fees again once Pioneer commenced NSD 526 of 2015. I do not accept this proposition.
3. Pioneer also asserted, albeit in a general way, some lack of good faith on Columbus’ part. To the extent this argument was articulated it was that when it first discovered the fraud Columbus was still willing to do business with Pioneer. Columbus only changed its position and decided to call an Event of Default on 18 December 2014 after Pioneer commenced proceeding NSD 1328 of 2014. I accept Columbus’ answer to these vaguely articulated arguments:

In the final paragraph of Pioneer’s Closing Submissions in relation to 526 of 2015, Pioneer implies that it is somehow germane to Pioneer’s case that Columbus was prepared for a period of some months after the redraw fraud was exposed in July 2014 to continue its business relationship with Pioneer. This is, of course, of no relevance to any issue before the Court. Columbus did not waive any relevant right and indeed served the default notice of 22 July 2014, making clear that it reserved its rights to exercise against Pioneer some or all of the many remedies available under the MOMD.

1. The claim of unconscionable conduct, if it was made at all, is doomed to fail. There is nothing in the circumstances of this case to support any notion that Columbus acted unconscionably in its dealings with Pioneer. Insofar as submissions were put in support of this argument, they disclosed nothing at all bar mere assertion.

###### Conclusions

1. Apart from the issues relating to cl 9.3 of the 1994 deed no part of Pioneer’s originating application in proceeding NSD 526 of 2015 has been sustained. As to the claims relating to cl 9.3, there is no purpose to granting any relief because the same result is obtainable by Columbus in reliance on cl 9.2. For these reasons it seems to me that the originating application in proceeding NSD 526 of 2015 should simply be dismissed, with costs.

##### PIONEER’S ORIGINAL CASE (NSD 1328 OF 2014)

###### Overview

1. This case turns on the letter dated 14 November 2014 which Columbus sent to borrowers within the Pioneer loan portfolio. The terms of the letter are set out above. Pioneer based its case on all available statutory provisions. As put in its written submissions:

21. The Applicants claim to relief arises under the Trade Practices Act 1974, the Competition and Consumer Act 2010, the Corporations Act 2001, the Australian Securities & Investments Commission Act 2001 and the National Credit Code.

22. In particular, the Applicant’s misleading or deceptive conduct claim arises under:

(a) ss 51A and 52 Trade Practices Act 1974;

(b) ss 18(1) and 20(1) Australian Consumer Law (ACL);

(c) ss 12DA(1) and 12BB Australian Securities and Investments Commission Act 2001;

(d) s 1041H(1) Corporations Act 2001.

23. The Applicant’s claim to injunctive relief arise:

(a) under ss 80(1), 87 and 87(1A) Trade Practices Act;

(b) under s 232(1) ACL;

(c) under s 12GD Australian Securities and Investments Commission Act 2001;

(d) s 1324 Corporations Act 2001.

24. The Applicant’s claim in relation to unconscionable arises under s 51AA of the Trade Practices Act and under corresponding provisions in the other nominated acts.

…

27. There are no relevant differences between the statutory provisions under each of the above mentioned acts. For example, in *GPG (Australia Trading) Pty Limited v GIO Australia Holdings Limited* (2002) ATPR (Digest) 46–217 Giles J found there was no relevant difference between the misleading and deceptive conduct statutory provisions: ASIC Act s 12DA; Corporations Law (as it then was) s 995; Trading Practice Act s 52. Similarly, with relation to general unconscionability, His Honour found that the construction of the ASIC Act s 12CA was governed by the same considerations as s 51 AA Trade Practices Act.

1. I do not propose to deal with these provisions in detail because, as explained below, I consider the case so weak on the facts. Pioneer’s written submissions did not assist because they were tied up with the claims relating to the loan agreements which were abandoned during the hearing. Pioneer’s case was thus confined to an allegation that the letter of
14 November 2014 involved conduct likely to mislead and deceive and which was unconscionable but, unfortunately, its case did not rise above assertion. For example, little, if any, reference was made by Pioneer to the evidence of borrowers which it adduced. I was left to consider that evidence for myself and attempt to work out how it supported Pioneer’s case. Having reviewed that evidence it does not support a case of misleading and deceptive conduct. It shows that some people took up the invitation in the letter to query the fee and were sufficiently unhappy about the letter to seek to refinance or pay out their loans.

###### Misleading and deceptive conduct?

1. According to Pioneer’s pleaded case the letter represented that:

a. the annual facility would be imposed regardless of whether or not the Borrower consented;

b. Pre 2008 Borrowers were offered a discount on the basis that they were valued customers (ie. the ‘Customer Loyalty Offset’);

c. the Loan Facility Fee was a contribution to the ongoing administration of the Loan Facility; and/or

d. AU$399 was a reasonable cost for the ongoing administration of the Borrower’s loan; and/or

e. the Respondents were entitled to vary the terms of the Credit Contracts without consideration.

f. the First Respondent was the manager of the borrowers’ loans with the Second Respondent under the Contract Credits.

1. **Representation (a)**: the letter says nothing about consent by the borrower. It also says nothing about the loan agreements between Pioneer First and the borrowers. In particular, it does not contain any statement that Pioneer First is entitled to charge the fee pursuant to those agreements. Insofar as express statements go, the letter simply states that an annual facility fee will be introduced on the borrower’s home loan and invites queries if the customer has any. It follows that Pioneer’s case must be that the letter impliedly represents that the facility fee will be imposed irrespective of the customer’s consent. In circumstances where the letter does not say anything about Pioneer First’s contractual arrangements with the customer I am not persuaded that the letter conveys representation (a).
2. If I am wrong in this regard then I am not persuaded that the representation was likely to mislead or deceive any borrower. First, in respect of loan agreements within categories B, C and E (set out above) Pioneer First was entitled to impose new fees without the consent of the borrower. Pioneer’s arguments to the contrary based on unconscionable conduct otherwise remained at the level of assertion and without any rational foundation in the facts. Its argument based on construction of the loan agreements, that only charges of the kind already identified therein were permitted, was unpersuasive. Second, the key element missing from Pioneer’s case is any representation in the letter that Pioneer First was entitled to impose such a fee under the loan agreement. Without such a representation, a representation that the fee was to be imposed irrespective of the borrower’s consent is not misleading or deceptive. No such representation was pleaded. If it had been pleaded I do not see how it could be sustained given the terms of the letter and the lack of any reference to the loan agreement. Third, the letter invites queries by the borrower. This is inconsistent with a representation that the fee would be imposed irrespective of its legality. Fourth, the evidence established that Columbus put in place a system for dealing with such queries before it sent the letter, the essence of which was that the fee would be waived in the event of objection by the borrower. Insofar as the letter conveys a representation as to a future matter, that system discloses that Columbus had reasonable grounds to believe that any borrower whose consent was required, and who did not consent, would contact Columbus as invited.
3. **Representation (b)**: the letter does offer a “customer loyalty offset”. Why that is misleading and deceptive conduct remains unclear. If it is said (as hinted at in the statement of claim) that all customers were made the same offer and thus no particular customer was a “valued customer”, nothing in the letter suggests that the “customer loyalty offset” was not being offered to all borrowers. A recipient of the letter would not have any basis to believe they were receiving a discount specific to their own circumstances as a valued customer.
4. **Representation (c)**: the letter conveys this representation but, again, Pioneer’s case that the representation was likely to mislead or deceive is misconceived. The letter says nothing about other funds available to cover those costs. It says nothing about what moneys are available for that purpose or to what extent or otherwise. As such, it was a matter for Columbus to organise its internal cost structures and to work out the source of funds to cover the administration costs. It follows that Columbus had reasonable grounds to make that statement. There is no basis in the evidence to suggest Columbus had any other intention than to use the funds to help cover the costs of administration. The evidence which showed that there is a cost to administer the loans which exceeds $399 per year was unnecessary for this purpose. The idea that Columbus had to audit its own costs before it could properly say to borrowers that it was imposing a fee to contribute to loan administration costs is fanciful. No one is suggesting that there were no such costs or that the annual fee was so far outside the bounds of an amount that would contribute to the covering of those costs that a reasonable person could not have reasonably believed a fee of that amount would perform the cost contribution function. Given that, the evidence of Columbus seeking to demonstrate the costs of administration exceed the amount of the fee is immaterial, as are the challenges to that evidence. The point simply goes nowhere.
5. Pioneer’s submissions about this issue appeared to be based on a misconception that if Columbus was seeking to increase its profits then the letter was necessarily misleading because the fee was not intended to cover loan administration costs. The submission incorrectly assumes something highly unlikely about Columbus’ internal management – that there is some special fund for covering loan administration costs separate from other money managed by Columbus –and pre-supposes some dichotomy that is equally unlikely – that if the costs of covering the loan administration are already covered from other sources the $399 fee cannot be to contribute to loan costs but must be to increase Columbus’ profit. Why these assumptions would be made is unclear. Columbus can cover its costs as it sees fit from any source. It can re-direct whatever money it was using before the fee was imposed to cover loan costs to any other purpose it wants. The fact that the fee would be likely to increase Columbus’ profit does not mean it was not a cost covering exercise. Pioneer has no basis in logic or the evidence for so submitting. Pioneer said in oral submissions:

But the thrust of our submission in relation to the $399 fee is that the court should find that it was implemented for the purposes of increasing the profits of the respondents rather than for the purposes of defraying ongoing management expenses…

1. If that be true, it does not advance the case of misleading or deceptive conduct. As such, the submissions about Columbus’ profit situation are irrelevant.
2. **Representation (d)**: the letter says only that the $399 fee is to contribute to the reasonable costs of the ongoing administration of the loan. It does not say what the cost of administering the loan is. It does not say that $399 is the cost of administering the loan. At its highest, the letter conveys that the author believes that $399 is a contribution to the reasonable costs of administering the loan. Nothing in the evidence indicated Columbus did not hold that belief or did not have reasonable grounds for so doing.
3. **Representation (e)**: I can see no basis for the claim that the letter conveyed this representation. As noted, the letter says nothing about the loan agreements at all. It does not imply any entitlement to vary the loan agreements.
4. **Representation (f)**: I also do not see how this representation was made. The letter is from Origin Mortgage Management Services and does not mention Columbus. There is no suggestion that people who read the letter would know anything about Columbus or its relationship to Pioneer First or, for that matter, Origin Mortgage Management Services. As the evidence of the lay witnesses discloses, the confusion caused by the letter had nothing to do with borrowers wondering who Columbus was. The borrowers’ loan agreements were with Pioneer First and the wondering they did was about who Origin Mortgage Management Services was. Pioneer’s complaint seems to be that the letter was representing that someone other than it was the manager of the loans. This is not what is pleaded, however. In any event, the letter does not say that Origin Mortgage Management Services was the manager of the loans. It says it was a manager of the loans. Given that Columbus controlled Pioneer First, and was free to do so under the name Origin Mortgage Management Services, there is nothing misleading and deceptive about the letter in this regard. It was common ground that Columbus had taken over many of the management functions which Pioneer had previously performed. Accordingly, it was a manager of the loans.
5. Another (not pleaded) representation said to be conveyed by the letter was that the $399 fee increase “would be counter-balanced in full by the interest reduction”. I disagree. The offset in the form of the interest reduction was said only to “reduce the impact” of the fee. It was not reasonable for any person to read the letter as it said that the entire fee would be offset by the interest reduction. Such a reading defies common sense. A mortgage manager would hardly bother to introduce a new fee to cover loan administration costs and at the same time give back that whole amount in the form of an interest reduction.
6. Yet another (not pleaded) point was raised by Pioneer when it submitted that under the loan agreements, where consent of the borrower was not required, the agreement nevertheless confined additional fees to those of the kind set out in the agreement and not new fees (a construction argument which I consider has no merit) and thus the letter to those borrowers was misleading because it “conveyed the misrepresentation that Columbus was able to impose an additional $399 fee quite outside the schedule of fees when in fact it could not impose a new fee entirely outside the schedule of fees without the borrower’s consent”. Again, and for the reasons already given, I see no rational basis for this submission.
7. I also do not accept Pioneer’s contention that Columbus, when it sent the letter, was bound to disclose certain matters in the letter and that the failure to do so was itself likely to mislead and deceive or be unconscionable. Pioneer said that Columbus had to disclose the following:

a. That if a borrower complained about the amount of $399, that amount would be waived and not sought to be recovered from the borrowers who complained;

b. That the amount of $399 was not a facility fee as such or a fee or charge that could be imposed under the Credit Contracts;

c. The amount of $399 was not a reasonable cost for the ongoing administration of the borrowers loan;

d. The amount of $399 was not a contribution to the ongoing administration of the Loan Facility.

1. As to (a), I cannot see any basis (and none was suggested by Pioneer) for subjecting Columbus to a duty to disclose that it had established a system for complaints under which it would waive the fee if the borrower objected. The letter invited the recipient to make contact with any query.
2. As to (b), the letter says nothing about the loan agreements and I am unable to see why it had to do so in order not to mislead or deceive.
3. As to (c), Pioneer has not proved that the amount of $399 was not a reasonable cost so the point does not arise.
4. As to (d), Pioneer has not proved that the amount of $399 was not to contribute to the loan administration costs and Columbus has proved to the contrary.
5. For these reasons I do not accept Pioneer’s case of breach of any of the statutory provisions proscribing misleading or deceptive conduct on which it relied.
6. If it is necessary to say so, I also found Pioneer’s evidence about the consequences of the letter unreliable and of no value. I adopt Columbus’ submissions in this regard:

14. Pioneer has made an argument that as there was an increase in percentage loan discharges after the Letter was sent the sending of the Letter must have been responsible for that increase. The discharge figures for the 30 days after the Letter was sent when compared to similar figures from the pre-Letter period at first seem to offer support to this argument, but that support vanishes when it is realised that any borrowers disgruntled by receipt of the Letter would not have had time to arrange refinance and then discharge within that 30-day period, and that as discharge figures fluctuated considerably from month to month drawing conclusions from a single month’s data is in any event highly questionable.

15. When Pioneer’s Mr Blow, in his affidavit of 2 April 2015, expanded his period of enquiry from 30 days immediately after the Letter to consider the 95-period from 15 December 2014 to 20 March 2015 (see [13(c)]), he found that average discharge amount per day had in fact fallen since the sending of the Letter from $64,625 to $55,329 (in other words, by more than 15%). Only by then calculating the discharge as a percentage of the loan book (which, of course, falls in value over time given that no more loans are being originated) could Mr Blow contrive to turn this into a 4.77% increase in annual discharges.

16. Mr Blow at paragraph 19 his affidavit of 2 April 2015 makes a calculation of loss based upon some borrowers referred to in the affidavit of Ms Pryde of
2 April 2015 as supposedly discharging due to the fee, but the source material for Ms Pryde’s identification does not appear in the evidence.

17. It follows that the simplistic analysis of pre-letter discharges versus post-Letter discharges produces equivocal figures. In any event, such a crude analysis that altogether disregards evidence that exists of the true reason for the discharges can offer no real support to Pioneer’s damages claim. Thus Mr Sick’s evidence is to be preferred.

1. Karl Sick is the Treasury Executive of Columbus. Mr Sick’s evidence, which I accept, was to the following effect (again, for convenience, adopting Columbus’ submissions):

12. Only 3 of the 40 Type A borrowers (Aiwekhoe, Worthington and Elliot) have discharged in circumstances which plausibly suggest the Letter was a motivating factor. Those 3 customers each complained about the increased fee and then arranged a discharge through refinance.

13. Of the Type B borrower who discharged subsequent to receiving the Letter, Mr Sick’s analysis shows that 12 discharged by reason of a property sale,
1 due to a low loan balance, and 9 through refinance. None of those discharging through refinance made a complaint about the fee, save it appears for Mr Larchin, who claims both to have complained and to have discharged by reason of the Letter. Of course, Type B contracts permit the increase of fees without the consent of the borrowers.

1. In this submission, Type A borrowers are those whose loan agreement prohibited the imposition of new fees without consent. Type B borrowers permitted the imposition of new fees without consent.

###### Unconscionable conduct?

1. Insofar as this claim was explained by Pioneer (which was not to any extent I found meaningful), it is that the sending of the letter was unconscionable conduct in respect of the borrowers who had loan agreements which prohibited the imposition of new fees without the borrower’s consent.
2. In answer I will adopt the oral submission made for Columbus as follows:

Now, almost as an aside or an afterthought, there is this unconscionability claim, and I notice that section 51AA of the Trade Practices Act is referred to. But that is unconscionability under the unwritten law of the State. In other words, that’s catching-bargains unconscionability where one shows that one side is at a disadvantage and one exploits that disadvantage to catch a bargain. Where is that? I mean, how can the sending of a letter be in that category? I submit that there just cannot be any unconscionability case on the matters pleaded and pressed by my friend.

1. No more can be said because Pioneer did not explain how Columbus’ conduct in sending the letter to borrowers was unconscionable but left its case at the level of unhelpful and unexplained assertions.
2. Pioneer also pleaded, but said nothing about, the *National Consumer Credit Protection Act 2009* (Cth). Insofar as that claim relating to the letter (as opposed to the loan agreements) was not expressly abandoned the claim as pleaded fails because the letter did not involve the introduction of any new term into the loan agreements (as to which see above).

###### Breach of contract?

1. It is not apparent to me how Columbus breached the loan agreements. The loan agreements were entered into by Pioneer First not Columbus. Pioneer First did not send the letter. Columbus sent the letter under the business name of Origin Mortgage Management Services. Insofar as the loan agreements permitted Pioneer First to impose new fees (see above) there can be no breach. Pioneer’s submissions to the contrary are unpersuasive. Insofar as the loan agreements required the borrower’s consent to any changes in fees, it is not clear how Pioneer can assert breach or obtain damages on a contract to which it is not a party. Any loss is that of the borrowers who have paid fees which Pioneer First was not entitled to charge. It is not a loss for Pioneer. To the extent Pioneer claimed injunctive relief to prevent Columbus from imposing any fee on a borrower where the loan agreement prohibited different charges from being imposed, again, it was unclear on what basis Pioneer, which is not a party to the loan agreements, sought such relief apart from the misleading and deceptive conduct claims which have been rejected.
2. I also do not accept that the letter involved any form of unilateral variation of any loan agreement by Columbus either with or without consideration. The letter said nothing about the loan agreements. It is not apparent to me that Columbus was intending to vary the loan agreements or that the letter had that effect.
3. Pioneer failed to articulate any meaningful case about these issues and thus nothing more can be said.

###### Conclusions

1. For the reasons given, Pioneer’s case in proceeding NSD 1328 of 2014 lacks substance and should be dismissed, with costs.

##### SUMMARY

1. I have concluded that, in substance, Columbus should succeed on its cross-claim in proceeding NSD 1328 of 2014. Apart from Columbus’ contention in respect of cl 9.3 of the 1994 deed, with which I disagree, Columbus has otherwise sustained its case on the cross-claim.
2. I have concluded that Pioneer’s claims in proceeding NSD 526 of 2015, which were largely responsive to the cross-claim but also included some additional matters, cannot be accepted other than insofar as Pioneer contended that cl 9.3 of the 1994 deed was not available to Columbus (a conclusion which has no substantive relevance because I have found that Columbus properly decided that there was an Event of Default by 18 December 2014 and was entitled to cease paying management fees as it did from 1 April 2015 by reason of cl 6.1(c) of the schedule to the deed of variation, and cl 9.2 of the 1994 deed is also available to Columbus to require repurchase of the relevant loans). I consider that proceeding NSD 526 of 2015 should be dismissed with costs.
3. I have concluded that Pioneer’s claims in proceeding NSD 1328 of 2014 cannot be accepted. I consider that Pioneer’s originating application in that matter should be dismissed with costs and any injunction which continues should be dissolved.
4. I propose to give the parties a short period to confer in order to file agreed or competing final orders and to list the matters thereafter for the making of orders as appropriate.

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| I certify that the preceding one hundred and ninety-five (195) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Jagot. |

Associate:

Dated: 30 September 2015